Supreme Court, U. S.
FILED
SEP 17 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-422

INTERNATIONAL ENGINEERING COMPANY, A Division of A-T-O, INC., *Petitioner*

v.

JAMES R. SCHLESINGER, Secretary of Defense, ET AL., *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, International Engineering Company, respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit in this proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 512 F.2d 573 (1975), *sub nomine, International Engineering Company, Division of A-T-O, Inc.,* v. *Elliott L. Richardson, Secretary of Defense, et al.* It appears in Appendix A. The subsequent orders of the Court of Appeals denying Petitioner's petition for rehearing and rehearing *en*

banc are also reproduced in Appendix A. The first opinion of the United States District Court for the District of Columbia is reported at 361 F. Supp. 818 and appears in Appendix D. The second opinion of the District Court is reported at 367 F. Supp. 640 and appears in Appendix B. The Findings of Fact and Conclusions of Law supporting that opinion appear in Appendix C. The mandate of the Court of Appeals was stayed pending consideration of Petitioner's motion for rehearing, or rehearing *en banc*. An additional stay was granted pending application for certiorari. A Motion for a Stay pending consideration of this Petition has been made in the Court of Appeals.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on May 2, 1975. Petitioner's petition for rehearing or rehearing *en banc* was denied on June 19, 1975. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) (1970).

QUESTIONS PRESENTED

This case involves the rights of the public, the Government, and the originators of billions of dollars worth of trade secrets presently in the possession of Federal agencies, and the ability of these parties to protect their respective rights within the jurisdictional boundaries of the Federal District Courts and the Court of Claims. It involves the right of an originator of data presently in the Government's possession to obtain judicial review of the procedural validity of actions by Air Force officials governed by regulation and the Constitution. These actions resulted in a determination to release the originator's trade secrets into the public domain without first affording the

minimal procedural due process required by the Constitution and the Armed Services Procurement Regulation.

Petitioner asks this Court to decide whether Petitioner can obtain the only effective relief—an injunction against wrongful disclosure—from the only forum empowered to grant it—a Federal District Court.

The central question to be decided in this case is whether a Federal District Court has jurisdiction to hear and determine a suit for declaratory judgment and injunctive relief by a Government contractor when that Court finds:

a. That Federal officials, from the Departmental Secretary on down, refused to afford Petitioner the minimal procedural due process required by the Armed Services Procurement Regulation and the Fifth Amendment to the Constitution before making a decision to place Petitioner's trade secrets and private property in the public domain; and

b. That Petitioner's only alternative forum would be in the Court of Claims in an action for damages which could be brought only after Petitioner's trade secrets had been disseminated to the public and thereby destroyed.

STATUTES AND REGULATIONS

The pertinent statutes and regulations are the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§701 *et seq.* (1970), and the Armed Services Procurement Regulations, 9-202 and 9-203, which appear in 32 §§ C.F.R. 9.202 and 9.203 (1969). These statutory and regulatory provisions are reproduced in Appendix E to this petition. ASPR 9-203(b) sets forth the mandatory data clause required by the

regulation. For administrative convenience this clause is set forth at ASPR 7-104.9(a), as well. For purposes of this petition all citations to the contract clause will be to ASPR 9-203(b), the underlying regulation.

STATEMENT OF THE CASE

1. *The Trade Secrets:* On July 7, 1969, Petitioner, International Engineering Co., (IEC) agreed to test models of IEC's LORAN-C/D-Guidance System, and to submit reports on such tests to the United States Air Force. In late March 1971, the Air Force requested that additional information concerning the internal circuitry and processes of IEC's LORAN components be included in the reports to be submitted. These components had been developed by IEC at its own expense and the information and data pertaining to the internal logic and circuitry of these components of IEC's System are trade secrets. The disclosure of these trade secrets would permit any other competent manufacturer to reproduce Petitioner's components to its competitive disadvantage. (Finding of Fact No. 45, Appendix C-17).

Recognizing both (a) the extreme competitive disadvantage that would accrue to IEC if the requested data were disclosed to its competitors, and (b) the Air Force's need to utilize such data for internal evaluation purposes, IEC provided the requested data in its reports to the Air Force with a restriction on its use and disclosure in accordance with the Armed Services Procurement Regulation. This type of data was provided in four reports to the Air Force, 70-06-4, 71-05, 71-07, 71-09, at various times. The Armed Services Procurement Regulation establishes the rights and interests in data provided to the Air Force by private industry and individuals. Briefly stated, data pertaining to components developed at private expense can be used by the Air Force only for limited internal purposes and cannot be disclosed outside the Department of Defense. (Appendix E16-17).

2. *The Air Force Threatens to Disclose IEC's Trade Secrets:* On April 19, 1971, the Air Force challenged the propriety of IEC's limitation upon use of the information contained in IEC Report 70-06-4. Petitioner informed the Air Force on June 15, 1971, that the information pertaining to the internal circuitry and logic of IEC's components had only been provided as a courtesy to the Air Force and that under ASPR such data was fully entitled to protection from disclosure to competitors. Moreover, Petitioner offered to delete the trade secrets from the Report if the Air Force wished to widely disseminate the test results. (Appendix C-8).

The Air Force never responded to Petitioner's letter. On June 30, 1971, IEC agreed to conduct tests of a second more advanced LORAN Guidance System, also developed at its own expense, and provide reports on those tests to the Air Force. On July 7, 1971, the Air Force accepted IEC Report 70-06-4. The District Court found that IEC reasonably interpreted the Air Force's final acceptance of this report as an acknowledgement that IEC's trade secrets would be protected by the Air Force. (Finding of Fact No. 17, Appendix C-9).

In October and December 1971, Petitioner submitted two additional test reports setting forth the results of testing accomplished by IEC on its new and updated guidance system. These reports contained, again at the Air Force's request, information relating to the internal logic and circuitry of the components of this new system that IEC developed at its own expense.

Again, the Air Force requested these trade secrets in order to allow it to thoroughly evaluate the test reports on the new IEC guidance system. In accordance with the Armed Services Procurement Regulation, IEC provided these reports containing its trade secrets to the Air Force subject to the restriction that they be used only for certain internal purposes and not be disclosed outside the Department of Defense.

However, by letter of December 28, 1971, the Air Force informed IEC that it would not accept IEC Report 71-09 unless IEC removed or substantiated its right to the restriction on the Air Force's use and disclosure thereof by January 5, 1972. Petitioner immediately responded with a detailed letter that described the development of the components involved at private expense, and cited the Armed Services Procurement Regulation in support of its right to demand restricted use of these portions of the test report describing the internal circuitry and logic of IEC's privately developed components. Five months went by. Then the Air Force, without any prior notice to IEC issued a determination that it was going to disclose IEC's trade secrets into the public domain. (Finding of Fact No. 28, Appendix C-12).

3. *Action of the Secretary of the Air Force:* Petitioner immediately requested the Secretary of the Air Force to delay disclosure of its trade secrets into the public domain, and to issue a determination protecting IEC's rights. The Secretary of the Air Force agreed to postpone disclosure pending his decision. But without disclosing the basis upon which the Air Force had determined to disclose IEC's trade secrets into the public domain in violation of the Armed Services Procurement Regulation, IEC was called upon to make a presentation to the Air Force on June 26, 1972. A

detailed presentation was made by IEC at that time to Air Force representatives, who were under orders not to discuss or in any way reveal to IEC the basis for the Air Force's determination to release Petitioner's data into the public domain. (Finding of Fact No. 31, Appendix C-13). These officials stated at that meeting that the final determination of the Agency's action in this matter would be made by the Secretary of the Air Force. (Appendix C-14).

Months passed without word from the Air Force. At the end of September 1972, IEC's test reports were accepted by the Air Force as originally submitted and final payment for those reports was made. Then, on October 5, 1972, the Air Force Contracting Officer, contrary to his previous statement that the dispute would be determined by the Secretary of the Air Force, determined that he would disclose IEC's trade secrets into the public domain immediately. Again, Petitioner protested to the Secretary of the Air Force and received assurances that the data would not be disclosed pending his decision in the matter. (Appendix C-14-15).

4. *After Redelegation, the Contracting Officer Determined to Disclose the Trade Secrets:* In January of 1973, the Petitioner made a presentation of its position to the Secretary of the Air Force. Again, no comments or statement of position were offered by the Air Force. Then, on February 8, 1973, a fifty-page statement of Petitioner's position in support of its right to prevent disclosure of its trade secrets was presented to the Secretary of the Air Force. But without giving the matter any further consideration and without informing IEC of the Air Force position on Petitioner's rights in the trade secrets, the Secretary redelegated the matter back to the Air Force Chief of Staff with instructions that IEC's February 8, 1973 written pre-

sentation be considered in any decision rendered. The Air Force Chief of Staff redelegated the matter back to the Commander of Air Force Systems Command who bounced it back to the Electronics System Division, where it was redelegated back to the very same official who had made the initial determination to disclose Petitioner's trade secrets into the public domain. (Appendix C-16).

But, despite the Secretary's direct order, that official did not even read IEC's February 8, 1973 letter. (Appendix C-16). Instead, on May 9, 1973, he again determined to release Petitioner's trade secrets into the public domain. As a result of the redelegation, and the authority vested in the Secretary under the Regulation, the decision of the official at Electronics System Division, Air Force Systems Command, United States Air Force, must be considered to be the action of the Secretary of the Air Force.

5. *The District Court Grants a Preliminary Injunction:* On May 10, 1973, Petitioner filed suit in the United States District Court for the District of Columbia requesting declaratory and preliminary and permanent injunctive relief. In two able and comprehensive opinions, the District Court held that: (a) the determination to release Petitioner's trade secrets into the public domain constituted adverse Agency action and that (b) the actions of the Air Force officials in determining to release Petitioner's trade secrets into the public domain without affording minimal procedural due process constituted a violation of Petitioner's rights conferred by the Armed Services Procurement Regulation and the Constitution of the United States. The District Court pointed out that no independent determination concerning Petitioner's rights had ever been made, and that the Petitioner had never been

given notice of the Agency's reasons for its determination to order public disclosure of Petitioner's trade secrets. (Appendix B-21). A preliminary injunction was issued.

6. *The Court of Appeals Reverses for Lack of Subject Matter Jurisdiction:* The Air Force appealed to the United States Court of Appeals for the District of Columbia. That Court reversed and remanded with orders to dismiss the suit for lack of subject matter jurisdiction. —— U.S.App.D.C. ——, 512 F.2d 573 (1975), Appendix A-15. It held, first, that the Administrative Procedure Act did not apply to this case because the decision to release Petitioner's data did not constitute Agency action. It concluded also, that the Administrative Procedure Act was inapplicable because Petitioner had another "adequate remedy" in the Court of Claims in the form of an action for damages after the disclosure was made. In a footnote, the Court of Appeals summarily reversed the holding of the District Court that the general equity jurisdiction of that Court conferred upon it power to hear this case and, further, that the illegal and unauthorized conduct of the Federal officials acting beyond the scope of their authority and in violation of the Constitution deprived them of the defense of sovereign immunity. (Appendix A-14).

7. *Stay of Proceedings Granted:* Petitioner, after motions for rehearing and rehearing en banc were denied by the Court of Appeals, obtained a stay of the Court of Appeals' judgment pending appeal to this Court. The data at issue thus has not been released outside the Government pursuant to the Air Force's determination.

REASONS FOR GRANTING THE WRIT

1. The decision below involves important questions of Federal law concerning the subject matter jurisdiction of the District Court to prevent the wrongful disclosure of trade secrets, through the arbitrary and capricious conduct of Government officials in refusing to accord minimal procedural due process as required by the Constitution and the applicable regulations. We submit that these questions should be settled by this Court.

2. In addition, these questions are of paramount public importance.

a. The manner in which these questions are settled will govern the future course of dealings between originators of data, the Government, and the public, relating to trade secrets in the Government's possession. Further, a decision by this Court would clarify the rights and remedies of those parties, thereby balancing the interest of 1) the originator in protecting his property, 2) the Government in collecting and using infinite amounts of data and information, and 3) the public in obtaining data collected by the Government.

b. The competing interests of the parties should be determined by this Court. And our facts clearly delineate the competing needs and interests of all affected parties. On the one hand, the originator of trade secrets developed at his own private expense seeks to protect those secrets from disclosure to his competitors. On the other hand, the Government has a need for such data for internal evaluation and decision-making. Moreover, the public and industrial competitors also have an interest in obtaining such data in order to evaluate the Government decision-making process and to

compete effectively. And it is notable that under the Armed Services Procurement Regulation at issue in this case, billions of dollars worth of data have been provided to the Government over the past thirteen years. As the District Court Judge ably pointed out in his opinion (Appendix B-11), contracts like the one involved in this case provide (1) more than half the dollar value of all Federal procurements, and (2) upwards of eighty-five percent of all military procurements. In turn, the Federal Government spends some 57.5 billion dollars annually on procurement, including 39.4 billion dollars on military procurement.[1]

c. As the District Judge pointed out, this case also involves the fairness and integrity of the procurement system of the Federal Government. The Government has a need for data pertaining to items, components, or processes, which might be useful to it in its governmental functions. But the Government should exercise fundamental fairness in dealing with the originators of such data. It should not be allowed to wrongfully disclose trade secrets to competitors of the originator by refusing to afford minimal procedural due process in violation of the regulations and the Constitution. If such action cannot be prevented before damage is done, then contractors will be loath to disclose their trade secrets to the Government, and will be further deterred from doing business with the Government.

d. The decision below creates a misalignment of remedies which may well result in a multiplicity of suits and inconsistent decisions on rights in the same item of data. There are myriad Federal statutes and

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[1] U.S. DEPARTMENT OF COMMERCE, FEDERAL PROCUREMENT AND CONTRACTING TRAINING MANUAL FOR MINORITY ENTREPRENEURS, at 2 (1975).

regulations governing the collection, preservation and disclosure of data by Federal agencies. Data collection and preservation measures such as the Armed Services Procurement Regulation should confer remedies which are consistent with (1) criminal sanctions against wrongful disclosures by Federal officers such as 18 U.S.C. § 1905 (1970), and (2) the remedies provided by the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1970). Failure to assure such consistency could well result in a situation wherein an originator of confidential data or a trade secret may be compelled by statute or regulation to provide such data to the Government. But the Government in turn may be compelled to release such data to a competitor or the public at large under the FOIA, only to find that subsequently the disclosing Federal officer was subject to criminal penalties, or the public treasury was subject to payment in damages, resulting from such disclosure.

Indeed, the Court below, which held that Petitioner could not seek relief in a District Court to prevent the disclosure of its trade secrets by Federal officers in violation of minimal procedural due process required by the applicable regulation, rendered an incompatible decision within days thereafter. Thus, in *Charles River Park "A", Inc.* v. *Dep't. of Housing and Urban Development,* decided March 10, 1975, amended June 17, 1975, it held that another data originator could obtain review in a Federal District Court of a determination by Federal officers to disclose that data, in response to a FOIA request. Hence, the decision below and *Charles River Park* are inconsistent with each other. Specifically, if an action for damages in the Court of Claims for the data disclosed is an "adequate remedy" so as to preclude Administrative Procedure Act review in the present case, we do not see why such an action should not also be an "adequate remedy" in

Charles River Park.

This conflict is merely illustrative of the legal quagmire created by the lack of consistency in remedies and jurisdiction under the Federal data collection, preservation, and dissemination statutes and regulations. This conflict should be settled by this Court in order to provide for orderly and consistent decisions on competing interests in data.

3. The decision of the Court below, in holding that sovereign immunity is not waived by the Administrative Procedure Act, conflicts with those of other circuits. Other circuits have held that it is waived.

4. Finally, the decision below amazingly held that the actions of the Government officials involved were not "agency action," even though those actions by the Secretary of the Air Force on down would "destroy" Petitioner's trade secrets and, as such, are squarely within the Administrative Procedure Act's definition of "agency action."

I. THE DECISION BELOW ERRONEOUSLY EMASCULATED THE JURISDICTION OF THE DISTRICT COURT BY PROHIBITING IT FROM AFFORDING PETITIONER THE TRADITIONAL PROTECTION AGAINST WRONGFUL DISCLOSURE OF ITS TRADE SECRETS.

A. Petitioner Would Be Irreparably Injured By Being Deprived of Its Right to Minimal Procedural Due Process in an Attempt To Prevent Unlawful Disclosure of Its Trade Secrets:

Under the Due Process Clause of the Constitution, and the regulatory provisions of the Armed Services Procurement Regulation §§ 9-202 and 9-203, Petitioner had a right to certain minimal procedural due process before a determination was made by the Air Force to offer Petitioner's trade secrets to its competitors.

The District Court found that minimal procedural due process was not accorded Petitioner before the Air Force made its determination. See the District Judge's able opinion at 367 F.Supp. 652-655. (Appendix B-18-24).

In addition, a hearing subsequent to the release of Petitioner's data would not provide an "adequate remedy" which would satisfy the requirements of the Fifth Amendment and ASPR. In any suit for damages in the Court of Claims for wrongful disclosure, that right to procedural due process before a determination to release Petitioner's trade secrets into the public domain would have disappeared forever, and the Petitioner would have been irreparably injured by the loss thereof. *Fuentes* v. *Shevin,* 407 U.S. 67 (1972), which this Court reaffirmed last term (*North Georgia Finishing Inc.* v. *Di-Chem, Inc.,* —— U.S. ——, 42 L.Ed. 2d 751 (1975); and see *Pollion* v. *Powell,* 47 F.R.D. 331 (N.D. Ill. 1969); and *Frost v. Weinberger,* 375 F. Supp. 1312 (E.D.N.Y. 1974).

A litigant should not be relegated to an alternative "remedy" that requires the destruction of the very rights which the party seeks to uphold. In *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U.S. 752 (1947), the Court held that a party need not pursue administrative remedies which will "certainly or probably result in the loss or destruction of substantive rights." 331 U.S. at 774.

B. Petitioner Would Be Irreparably Injured by Disclosure of Its Trade Secrets:

1. It is well settled that an injunction will lie to enjoin wrongful disclosure of trade secrets, on the ground of irreparable injury:

An action at law in the Court of Claims for money damages for wrongful disclosure of trade secrets would

be a hopelessly inadequate remedy. It is well settled that the injury caused by the improper disclosure of a trade secret is massively irreparable. No damage award can restore to secrecy what has been revealed, or adequately compensate the owner of data for the results of disclosure. As Professor Jaffe has stated in cogent terms:

> "Irreparable injury in its strictest sense is the probable loss . . . of the value (monetary or moral) of an asserted right or defense. *A classic example is the case where an agency in the course of a proceeding proposes to reveal a document in its possession for which a person claims a right to confidential treatment.*" L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, 429 (1965). (Emphasis added, footnote omitted.)

To the same effect is *Utah Fuel Co.* v. *National Bituminous Coal Commission,* 306 U.S. 56 (1939). The Court there held that a District Court had jurisdiction to hear a suit for an injunction against the Coal Commission's disclosure of confidential information. Indeed, this Court then stated in perfectly clear language that the Petitioner there, like IEC here, faced "great and obvious damage," partially because it lacked "any other remedy." 306 U.S. at 60. And this Court has consistently sustained injunctions against the improper disclosure or use of data in other cases as well. *See, e.g., E. I. Du Pont De Nemours Powder Co.* v. *Masland,* 244 U.S. 100 (1917); *Board of Trade of the City of Chicago* v. *Christie Grain & Stock Co.,* 198 U.S. 236 (1905).

Moreover, the lower courts have almost universally enjoined the wrongful use or dissemination of trade secrets, on the ground of irreparable injury. Indeed, the entitlement of a trade secret owner to an injunction

against such use or disclosure has been recognized so consistently, that injunctions are granted almost as a matter of course in such cases. *See, e.g., E. W. Bliss Co.* v. *Struthers-Dunn, Inc.,* 408 F.2d 1108 (8th Cir. 1969); *Herold* v. *Herold China & Pottery Co.,* 257 F. 911 (6th Cir. 1919); *Kodekey Electronics, Inc.* v. *Mechanex Corp.,* 486 F.2d 449 (10th Cir. 1973); *John T. Lloyd Laboratories, Inc.* v. *Lloyd Brothers Pharmacists, Inc.,* 131 F.2d 703 (6th Cir. 1942); *Com-Share, Inc.* v. *Computer Complex, Inc.,* 338 F.Supp. 1229 (E.D. Mich. 1971), *aff'd,* 458 F.2d 1341 (6th Cir. 1972); *Smith* v. *Dravo Corp.,* 203 F.2d 369 (7th Cir. 1953); *B. F. Gladding & Co., Inc.* v. *Scientific Anglers, Inc.,* 245 F.2d 722 (6th Cir. 1957); *Engine Specialties, Inc.* v. *Bombardier Ltd.,* 454 F.2d 527 (1st Cir. 1972); *Raybestos-Manhattan, Inc.* v. *Rowland,* 460 F.2d 697 (4th Cir. 1972); *Bull* v. *Logetronics, Inc.,* 323 F.Supp. 115 (E.D. Va. 1971); *Bryan* v. *Kershaw,* 366 F.2d 497 (5th Cir. 1966), *cert. denied,* 386 U.S. 959 (1967); *American Ice Co.* v. *Royal Petroleum Corp.,* 261 F.2d 365 (3d Cir. 1958); *Winston Research Corp.* v. *Minnesota Mining & Mfg. Co.,* 350 F.2d 134 (9th Cir. 1965).

Now, contrary to this massive wall of settled law, the U.S. Court of Appeals for the District of Columbia stands out alone and unsupported.[2] The criticality

[2] The complete lack of support for the Court's conclusion is shown by the fact that it cited only a single case, which simply has no application to ours. It cited *Aktiebolaget Bofors* v. *United States,* 153 F. Supp. 397 (Ct. Cl. 1957) for the proposition that IEC could recover the fair market value of its data. But the *Bofors* case did not even involve trade secrets. There, the plaintiff sued for damages for the breach of a license to manufacture guns. The United States had breached its license agreement by shipping Bofors guns overseas. The plaintiff's damages could be easily computed from the number of shipments, and the license remained intact.

As this Court recognized in *Kewance Oil Co.* v. *Bicron Corp.,* 416 U.S. 470, 475 (1974), "The subject of a trade secret must be

of this single deviation from this generally accepted and long standing rule of law is multiplied many-fold in the case of threatened disclosure by a Federal officer since the great majority of suits with multiple defendants who are Federal officers are brought in the District of Columbia.

2. There is no adequate remedy at law for wrongful disclosure of Petitioner's trade secrets:

The previously cited cases establish that in trade secret controversies, an action at law for damages for wrongful disclosure is simply not an adequate remedy. Petitioner's case falls squarely within these holdings.

More specifically, proof of the value of a trade secret which has been disclosed to competitors is impossible to present in acceptable form so as to provide a basis for a decision in the Court of Claims.[3]

First, the Court of Appeals acknowledged that the only just measure of damages for the loss of Petitioner's data was its "fair market value." Appendix A-14-15. But the determination of the "fair market value" of trade secrets which have been disclosed to competitors is a sheer impossibility as a matter of proof. No one can measure in dollars the extent of use by competitors, or the subtle translation of trade secrets into competitors' products.

Second, Petitioner has no practical chance of recovering the profits it would have earned had its data

secret. . . ." Once Petitioner's trade secrets are disclosed, its rights in its data will vanish. *Formulabs, Inc.* v. *Hartley Pen Co.,* 275 F.2d 52 (9th Cir.) *cert. denied,* 363 U.S. 830 (1960).

[3] The Court of Claims jurisdiction is limited to a suit for actual damages incurred and thus a determination of damages is a prerequisite to a decision. See *United States* v. *King,* 395 U.S. 1 (1969).

been kept secret. The appellant's proof in *Winston Research Corp.* v. *Minnesota Mining & Mfg. Co.,* 350 F.2d 134 (9th Cir. 1965), of the profits they would have earned if their data had remained secret was rejected by the court as "highly speculative." 350 F.2d at 144. *See also, Engine Specialties, Inc.* v. *Bombardier Ltd.,* 454 F.2d 527, 531 (1st Cir. 1972).

Third, in our case, the impossibility of recovering damages for the wrongful disclosure of trade secrets is multiplied many times. Usually the trade secrets involved are disclosed only to a single company by a defecting employee. But if the Government should release Petitioner's data through the Defense Documentation Center as it plans to do (Appendix C-15), the information would be broadcast to the world. There would be no practical way for Petitioner to discover who received the data after its disclosure, or to measure how Petitioner's trade secrets were subtly translated into competing hardware.

Fourth, proof of the value of a "competitive advantage," as a practical matter, is also impossible. In *Bryan* v. *Kershaw,* 366 F.2d 497 (5th Cir. 1966), *cert. denied,* 386 U.S. 959 (1967), the Court suggested that the incalculability of a competitive advantage is itself sufficient grounds to enjoin the improper disclosure or use of trade secrets:

> ". . . the creation of a marketing advantage by virtue of a breach of confidence weighs heavily in favor of injunctive relief. Indeed, it can be said that the unfair advantage gained is the damage that the injunction is designed to cure." 366 F.2d at 501-2.

Fifth, the impossibility of adequately computing damages after the wrongful disclosure of trade secrets

perhaps explains why, since the Court of Claims was created in 1855, there is apparently only one case in which it has awarded any money damages at all even relating to the disclosure of trade secrets. *Padbloc Co., Inc.* v. *United States,* 161 Ct. Cl. 369 (1963). And the unique facts of that case bear no resemblance whatever to ours.[4]

The fact that for over 100 years, there appears to have been only one successful action in the Court of Claims for damages even relating to disclosure of trade secrets, demonstrates the practical inadequacy of any such remedy in Petitioner's case. *See, e.g., Mannings* v. *Board of Public Instruction,* 277 F.2d 370 (5th Cir. 1960); *Marsh* v. *County School Board of Roanoke County, Va.,* 305 F.2d 94 (4th Cir. 1962); *McCoy* v. *Greensboro City Board of Education,* 283 F.2d 667 (4th Cir. 1960).

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[4] The Court of Claims could easily compute the plaintiff's damages in *Padbloc.* The Government breached an implied contract to use data only for the inspection of certain fire bomb packaging which the data described. The plaintiff had promised to give the Government a royalty free license to use and disclose the data after the procurement of 104,000 bombs which were wrapped in Padbloc's packaging. The damage from the Government's premature disclosure of the data could be easily computed by determining the profits Padbloc would have earned on the procurement of the 104,000 bombs. Thus, Padbloc had already agreed to disclose its trade secrets for certain consideration. It remained only for the Court of Claims to direct that such consideration be paid. Petitioner herein never agreed to the disclosure of its trade secrets at any price.

II. THE COURT OF APPEALS DISREGARDED DECISIONS OF THIS COURT BY APPLYING THE BAR OF SOVEREIGN IMMUNITY EVEN THOUGH AIR FORCE OFFICIALS EXCEEDED THEIR STATUTORY AND CONSTITUTIONAL POWERS.

A. Defendants Exceeded Their Statutory Authority in Determining To Put Petitioner's Trade Secrets into the Public Domain.

In *Dugan* v. *Rank,* 372 U.S. 609 (1963), the Court set two exceptions to the doctrine of sovereign immunity:

> ". . . (1) action by officers beyond their statutory powers and (2) even though within the scope of their authority, the powers themselves or the manner in which they are exercised are constitutionally void. 372 U.S. at 621-2.

These exceptions are both applicable to this case. The District Court held that the ASPR provisions involved require minimal procedural due process before a determination to release Petitioner's trade secrets into the public domain. Appendix B-21. The Court of Appeals did not even discuss this subject; and Petitioner submits that the holding of the District Court is sound and should be accepted by this Court.

Specifically, in deciding to disclose the data without first affording Petitioner even minimal procedural due process, the Defendants exceeded their statutory powers. They had no authority under which they could release data except that contained in ASPR 9-202.3, as further implemented by ASPR 9-203(b). Moreover, the legal force of ASPR 9-202.3 is derived from its independent status as a regulation, and not from the presence of implementing language in a contractual agreement. This Court has recognized that even when a regulation is incorporated into a contract, its legal status as a regulation remains unaffected. *Chapman* v. *Sheridan-Wyoming Coal Co., Inc.,* 338 U.S. 621 (1950).

The regulation authorized only a single procedure for permitting the disclosure of data that the contractor had marked with a "limited rights" legend. But the Defendants did not follow that procedure. Instead they attempted to put Petitioner's trade secrets into the public domain without affording Petitioner the minimal procedural due process required by the Regulation.

A Government official who acts beyond the scope of his authority acts illegally and may be enjoined from doing so. Indeed, when a Government official exceeds his statutory powers, we do not even reach the subject of sovereign immunity. *Dugan* v. *Rank, supra.* In *Greene* v. *McElroy,* 360 U.S. 474 (1959), this Court reversed a summary judgment refusing an injunction against the continued denial of access to classified information. The Court based its reversal on the fact that the procedure by which Greene's security clearance had been removed was unauthorized. 360 U.S. at 508. *See also, Harmon* v. *Brucker,* 355 U.S. 579 (1958).

B. The Defendants Also Exceeded Their Constitutional Authority in Determining To Put Petitioner's Trade Secrets into the Public Domain:

The District Court held that, if the ASPR did not require the Defendants to afford Petitioner minimal procedural due process before they decided to disclose Petitioner's data, the regulations would violate the due process clause of the Fifth Amendment, Appendix B-22. It is elementary that where a Government official exceeds his constitutional powers, sovereign immunity is not involved. And actions which threaten

an unconstitutional exercise of power may also be enjoined. *Dugan* v. *Rank, supra.*

In *Malone* v. *Bowdoin,* 369 U.S. 643 (1962), this Court reiterated that sovereign immunity did not bar a suit against a deprivation of property that constituted "an unconstitutional taking of property without just compensation." 369 U.S. at 648, *quoting Larson* v. *Domestic and Foreign Commerce Corp.,* 337 U.S. 682, 697 (1949).

C. If Sovereign Immunity Should Be Deemed To Be Involved, It Has Been Waived by the Administrative Procedure Act.

1. The Contracting Officer's decision to disclose Petitioner's trade secrets is "Agency Action" under the Administrative Procedure Act.

The decision to release Petitioner's trade secrets into the public domain was reviewed and upheld at the highest levels of the Air Force (*See* Appendix C-15-16). Nevertheless the Court below held that the Administrative Procedure Act does not apply to this case because the decisions by Air Force officials did not constitute agency action. (Appendix A-13-14).

We submit that the Court's holding was in error. It is plain from the words of the Administrative Procedure Act that the Air Force's decision to release Petitioner's data was "AGENCY ACTION." That term is defined in 5 U.S.C. § 551(13) (1970) as ". . . the whole or a part of any agency rule, order, license, *sanction*. . . ." (Emphasis added). The definition of sanction includes the "destruction, taking, seizure or withholding of property. . . ." 5 U.S.C. § 551 (10)(D) (1970). The Air Force's decision to release Petitioner's data constituted a sanction of the most vivid sort. Indeed, the public disclosure of Petitioner's trade secrets would

irreparably and irretrievably "destroy" Petitioner's property rights in those secrets.

2. There is a conflict in the circuits as to whether the Administrative Procedure Act waives sovereign immunity, which should be resolved by this Court:

There is a conflict in the circuits as to whether the Administrative Procedure Act waives sovereign immunity. We submit that the better view is that it does. *Scanwell Laboratories Inc.* v. *Shaffer,* 424 F.2d 859 (D.C. Cir. 1970); *Estrada* v. *Ahrens,* 296 F.2d 690 (5th Cir. 1961); *Kletschka* v. *Driver,* 411 F.2d 436 (2d Cir. 1969). *See* K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 27.00 (1970). As the Fifth Circuit concluded in *Estrada* v. *Ahrens, supra:*

> "By providing judicial review in an action brought by 'any person adversely affected or aggrieved by any agency action' Congress permitted suits which under established tests would certainly be barred as suits against the Government. 296 F.2d at 698.

The decision below held to the contrary.

3. Waiving sovereign immunity in our case will not "Destroy the Court of Claims."

The Court below stated that if the APA waived sovereign immunity, that would "destroy the Court of Claims by implication." Appendix at A-13, *quoting Warner* v. *Cox,* 487 F.2d 1301, 1306 (5th Cir. 1974). But no such terrible catastrophe can be anticipated. For the APA only applies if there is "no other adequate remedy in a court . . ." 5 U.S.C. § 704 (1970). And we have shown above that an action for damages in the Court of Claims would be hopelessly inadequate as a remedy for wrongful disclosure of trade secrets.

Also, *Warner* v. *Cox, supra,* has no application whatever. The plaintiff in *Warner* invoked the Administrative Procedure Act in a District Court suit in which equitable relief was claimed. But, the so-called suit in equity appears to have been an attempt to obtain monies from the public treasury far in excess of the District Court's jurisdictional limit under the Tucker Act.

CONCLUSION

The Court of Appeals for the District of Columbia Circuit erred in ordering the District Court to dismiss Petitioner's suit for lack of subject matter jurisdiction.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT.

INTERNATIONAL ENGINEERING COMPANY, DIVISION OF A-T-O, INC.

v.

ELLIOT L. RICHARDSON, Secretary of Defense, et al., Appellants.

No. 74-1192.

Argued Feb. 24, 1975.

Decided May 2, 1975.

Before TAMM and LEVENTHAL, Circuit Judges, and MILLER,* Judge, United States Court of Customs and Patent Appeals.

TAMM, Circuit Judge:

Appellant challenges the propriety of the district court's issuance of a preliminary injunction against the United States enjoining it from distributing certain test reports submitted pursuant to a government contract because of the likelihood that the Air Force erroneously failed to recognize appellee International Engineering Company's (IEC) proprietary interest in certain data contained in the reports. For the reasons stated below, we hold that the injunction was improper as the district court lacked subject-matter jurisdiction and order the injunction vacated and the case dismissed.

I

In February, 1968, appellee IEC submitted to the United States Air Force an unsolicited proposal concerning its privately developed long-range navigation (LORAN C/D)

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* Sitting by designation pursuant to 28 U.S.C. § 293(a).

bomb/missile guidance system. On July 7, 1969, the parties contracted for construction of a bread-board model of the LORAN C/D system (referred to by the parties as "Unit A"), performance of certain laboratory and helicopter flight tests, and delivery to the Air Force of a final report on the tests. Specifically incorporated by reference as contract clauses were forty-four contract provisions set forth in the Armed Services Procurement Regulations (ASPR), 32 C.F.R. pts. 1-30 (1974), including the "Rights in Technical Data" Clause (ASPR 7-104.9(a)) and the standard "disputes clause" (ASPR 7-103.12), establishing mechanisms for resolving contract disputes.

By the spring of 1970, IEC had developed a more compact LORAN C/D system. Thereafter, on October 27, 1970, the parties modified the contract to test the system with the new developments. IEC again agreed to construct a breadboard model of the new subsystem (referred to by the parties as "Unit B" and to submit test reports.

In late March, 1971, the Air Force directed IEC to provide further information concerning the components and processes to help it evaluate the test results. IEC submitted the data, in an interim report, 71-05, and in its contractually-mandated Final Report 70-06-4. Both reports were marked with notice of "limited rights," restricting the Air Force's distribution rights to the Unit B data.

By letter of April 19, 1971, the Air Force contracting officer questioned the propriety of the restrictive legend (limited rights) on Final Report 70-06-4, referred appellee to the "Rights in Technical Data" clause of the contract, and requested a prompt response to "why the Government does not have the right to remove the legends in question." A. 46. IEC responded on June 15, 1971 that Unit B had been "developed and built at contractor expense, and [had] been made available for this effort on a no charge loan basis." IEC maintained that its contractual obligation to submit a final report "could have been met without inclusion of proprietary information" and the "[i]f the Air

Force requires unlimited rights" in the report, IEC would revise the report by deleting the data. A. 48-49.

On June 30, 1971, the parties again negotiated a contract modification which required IEC to conduct further tests and submit test reports; on July 7th, the Air Force accepted Report 70-06-4.[1] On October 15, 1971, appellee submitted Interim Report 71-07 and then on December 10, 1971, Report 71-09 as the concluding report under its contractual obligations; both reports contained limited rights notices covering the same information submitted in Report 70-06-4.

By letter on December 28, 1971, the contracting officer, again referring to the "Rights in Data" clause, notified IEC that Report 71-09, "even if found to be technically correct", would not be accepted until appellee either removed or substantiated all proprietary markings. A. 50. Expressing surprise that the issue had resurfaced, IEC on January 5, 1972, reviewed the history of the parties' course of dealing, asserted that Report 70-06-4 had been accepted with proprietary restrictions, offered to delete

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[1] IEC maintains that the acceptance of the report created a reasonable expectation that "the rights in data question had been resolved in [IEC's] favor and that the Air Force would not object to the attachment of the 'limited rights' legend on data in subsesuent reports describing IEC private-developed processes and components." Appellee's Br. at 19. *See also* IEC's letter of Jan. 5, 1972, A. 51. However, Air Force officials involved later indicated: "it was decided that the contention over the proprietary markings was a separate entity from the technical acceptance. . . ." Harshfield Dep. Ex. 1. That latter view is clearly correct; part of the Rights in Technical Data clause incorporated into the contract authorizes the Government to correct or cancel any marking "[n]otwithstanding any provision of this contract concerning . . . acceptance." ASPR 7-104, 9(a)(d). Although there is no record evidence of any waiver or modification of that clause, the district court held that the Government was estopped. International Engineering Co. v. Richardson, 367 F.Supp. 640, 656 n.12 (D.D.C. 1973). We do not reach the correctness of this holding.

the data, and reiterated its belief that the restrictions were appropriate. A. 51-52.

The next official exchange occurred on June 5, 1972, when the Air Force again informed IEC that it had failed to substantiate its limited rights notices and that the Air Force intended to strike them and use the data with unlimited rights. A.53-54. On June 26, 1972, representatives of both parties participated in a two-hour meeting on the matter; IEC was asked to provide further detail and written documentation so that its claim could be forwarded to higher headquarters. The Air Force agreed to treat the data with limited rights during the pendency of the dispute. Soon thereafter final payment was made on the contract.

Not having received any additional documentation by October, 1972, the contracting officer again notified IEC of the Air Force's intention to utilize the data with unlimited rights. IEC immediately protested the report's imminent release to the Director of the Defense Documentation Center and the Secretary of the Air Force. In December, 1972, IEC received assurances that the material would not be released until a decision was made on the "limited rights" question.

In January, 1973, the contracting officer's technical and legal advisors briefed headquarters personnel of the Air Force Systems Command (AFSC) and United States Air Force (USAF). IEC's counsel met with Counsel to the Secretary of the Air Force and representatives of AFSC and USAF. At the Secretary's Counsel's request, IEC submitted further written materials on February 8, 1973. A. 58-60. On March 16, 1973, the Air Force Chief of Staff authorized AMSC to make a final decision on the dispute after considering IEC's February 8th submission. AMSC returned the matter to the contracting officer for final decision. That officer's technical advisor concluded that the letter of February 8th contained no information relevant

to the issue and recommended striking the limited rights notice. On May 9, 1973, IEC was so informed.

On May 10, 1973, IEC filed suit in district court for declaratory and injunctive relief and a temporary restraining order. IEC sought review of the contracting officer's decision to strike the proprietary notice, characterizing it as agency action reviewable under section 10 of the Administrative Procedure Act. (APA), 5 U.S.C. § 702 (1970). The Air Force contended that the dispute arose under the contract; that the officer's decision did not constitute agency action; that the proper forum for the claim was either before the Armed Services Board of Contract Appeals or the Court of Claims; and that thus the district court lacked subject matter jurisdiction or the suit was barred by sovereign immunity.

In a Memorandum and Order filed July 10, 1973, the district court held that the decision of a contracting officer, acting pursuant to an ASPR provision incorporated into a contract, constituted agency action and that the APA served as a sovereign immunity. International Engineering Co. v. Richardson, 361 F. Supp. 818, 821-22 (D.D.C. 1973). However, the judge believed that the record of the officer's reasoning was insufficient to permit review of the decision to strike the restrictive notice and remanded the case to the officer for a fuller exposition *Id.* at 823-25. After receiving that statement,[2] on October 24, 1973, the

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[2] In his statement of reasons, the contracting officer noted that "[r]esolution of the data rights problems concerning Unit B is difficult, and may be impossible for the Government to resolve." He emphasized that:

> The Rights in Technical Data clause, paragraph (d), places the burden of substantiating the propriety of restrictive legends on the contractor because his cooperation is needed to resolve this type of problem. All pertinent records are in his possession. Many important details are locked in his mind. It may be necessary for him to explain the significance of some record entries.

A. 63.

district court entered a preliminary injunction.[3] International Engineering Co. v. Richardson, 367 F.Supp. 640 (D.D.C. 1973). This appeal followed.

II

This suit raises the special problems of jurisdiction and sovereign immunity because in essence the United States is the defendant here. The general rule of sovereign immunity is that the United States cannot be sued without its consent. *E.g.*, United States v. Sherwood, 312 U.S. 584, 586,

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The officer relied upon the contract clause which granted IEC proprietary rights only if Unit B had been developed at private expense and opined that development includes the demonstration by testing that a prototype fulfills the developer's objective. He pointed out that the Government regards even one percent Government funding as precluding a finding of development at private expense and as resulting in the Government obtaining 100 percent unlimited rights. He indicated that a substantial possibility existed that the final phases of development of Unit B—testing—were performed with contract funds. Under any circumstance, he reemphasized that IEC had failed to meet its contractually-allocated burden of substantiation. A. 62-76.

[3] After reviewing its previous decision and holding that the APA provided subject-matter jurisdiction and waived sovereign immunity, the district court found that the interests identified in Scanwell Laboratories, Inc. v. Shaffer, 137 U.S.App.D.C. 371, 424 F.2d 859 (1970)—IEC's interest in preventing injury from any illegal, arbitrary and capricious action by the contracting officer and the public interest in having government contracts administered fairly—dictated a limited review. The district court concluded that the grant of a preliminary injunction was proper under the standards established by this court in Virginia Petroleum Jobbers Ass'n v. FPC, 104 U.S.App.D.C. 106, 259 F.2d 921, 925 (1958): 1) appellee was likely to succeed on the merits because the contracting officer failed to provide minimal due process before striking the restrictive legends; 2) appellee would be irreparably injured without relief in that it would lose its competitive advantage; 3) the injunction would not substantially harm other interested persons; and 4) the public interest would be served. 367 F.Supp. at 649-57. In light of our conclusion on jurisdiction and sovereign immunity, *infra*, we do not reach the remainder of the district court's decision.

61 S.Ct. 767, 85 L.Ed. 1058 (1941). The sovereign may waive its immunity by statute, and such consent, if given, may be subject to any conditions which Congress sees fit to require. *See, e. g.*, Sherwood v. United States, *supra;* Best Bearings Co. v. United States, 463 F.2d 1177, 1179 (7th Cir. 1972). On the one hand, for contract actions against the United States, Congress, through passage of the Tucker Act, 28 U.S.C. §§ 1346(a), 1491 (1970), has consented to suit. For claims under $10,000, the Court of Claims and the district courts have concurrent jurisdiction; the Court of Claims has exclusive jurisdiction for claims over $10,000. Congress has, however, imposed conditions on its waiver of sovereign immunity. The Court of Claims has jurisdiction only to award damages, Glidden v. Zdanok, 370 U.S. 530, 577, 82 S.Ct. 1459, 8 L.Ed.2d 671 (1962); it may neither grant declaratory, United States v. King, 395 U.S. 1, 89 S.Ct. 1501, 23 L.Ed. 52 (1969), nor injunctive relief, Glidden v. Zdanok, *supra*.[4]

On the other hand, we have held that Congress in enacting the APA, made a more general waiver of sovereign immunity in section 702[5] whenever that section is applicable. Scanwell Laboratories, Inc. v. Shaffer, 137 U.S.App. D.C. 371, 424 F.2d 859 (1970). The district court, relying in large part on *Scanwell,* found jurisdiction in this case. In its first opinion, 361 F.Supp. at 821-23, the court concluded that IEC was "aggrieved" by agency action—the

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[4] The district court, when exercising concurrent jurisdiction, may only adjudicate claims which would also be maintainable in the Court of Claims. United States v. Sherwood, 312 U.S. 584, 590-91, 61 S.Ct. 767, 85 L.Ed. 1058 (1941). Hence, in such situations, the district court would have no authority to grant equitable relief. Richardson v. Morris, 409 U.S. 464, 93 S.Ct. 629, 34 L.Ed.2d 647 (1973).

[5] 5 U.S.C. § 702 (1970) provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

acts taken by the contracting officer pursuant to the Rights in Technical Data clause "which has the force of law in this Contract."[6] While conceding that *Scanwell* was not directly on point, the court asserted that the primary concerns identified in that case—plaintiff's interest in preventing economic injury and the public's interest in preventing arbitrary or capricious action—were present here and justified accepting jurisdiction. Finally, the court said that in exercising jurisdiction it was providing the only forum from which appellee could obtain injunctive relief as the Court of Claims and Armed Services Board of Contract Appeals could not grant such relief.

In its second decision, 367 F.Supp. 640, the court began from the premise that even if it possessed jurisdiction, the decision to grant judicial relief was discretionary. *Id.* at 647-48; *see* M. Steinthal & Co. v. Seamans, 147 U.S.App. D.C. 221, 455 F.2d 1289 (1971). The court then concluded that relief was appropriate both to vindicate the interests identified earlier and because of the court's doubt over the likelihood of the adequacy of a damage remedy in the Court of Claims. Recognizing that neither the only potential buyer of products relating to the data, the United States, nor IEC itself foresaw any practical value in the information (except as for what type of research not to do), the court opined it was "more important" that IEC received injunctive, rather than compensatory, relief. 367 F.Supp. at 649.

[6] This portion of the district court's opinion is particularly confusing. In the text, reference is made to "ASPR 9-203(a)-(d) which has the force of law in this Contract.[2]" That section instructs contracting officers to include ASPR 7-104.9(a), the uniform Rights in Technical Data contract clause, in any appropriate contract. In the footnote, the court opines that there is no authority that "an ASPR once incorporated as a contract clause parts with all identity as a federal regulation governing certain acts of Contracting officers." Presumably, the court is now discussing, as it has been all along, ASPR 7-104.9(a) (not ASPR 9-203), which was incorporated into the contract. In that same footnote, the court went on to note that several cases had suggested that the ASPR had the force of law and asserted its belief that IEC could invoke an ASPR "against an administrative determination contrary to the regulation's terms." 361 F.Supp. at 822 n.2.

We must disagree with that analysis and conclusion. We believe that this case is a contract action falling squarely within the purview of the Tucker Act; therefore, the APA is inapplicable. As indicated below, several converging avenues of analysis yield this conclusion. First, reliance on interests identified in *Scanwell* are inappropriate here. Moreover, we cannot accept the proposition that Congress intended to alter drastically the limited remedies and waiver of sovereign immunity embodied in the Tucker Act; adopting IEC's position would result in the destruction of the Court of Claims by implication. Finally, under any circumstance, the APA is inapplicable by its own terms because of appellee's adequate remedy before the Court of Claims.

We start with our firm belief that the gravamen of appellee's complaint is a claim for breach of contract. Although the restrictive markings in question were affixed to reports submitted pursuant to the contract, appellee contends that the material at issue was not required to be included in its reports, Appellee's Br. at 7, 47; resolution of that question is a matter of contract interpretation. The major controversy concerns the Government's rights in the data under the contractually incorporated "Rights in Technical Data" clause. Settlement of that dispute requires interpretation of contract clauses to ascertain whether the material should be considered "design" or "form, fit, or function" data.

A reading of the district court opinions demonstrates its recognition of the contractual underpinnings of the proceedings. The district court applied as one of alternative standards of review "settled principles of contract law." 367 F.Supp. at 649. The court also determined that review was appropriate because of the public interest in prevent-

ing arbitrary or capricious decision-making in the administration of government contracts, stating that the court "must undertake a limited review of the contracting officer's *decisions* rendered pursuant to the Rights in Data clause to determine whether it is likely that he acted arbitrarily and without a rational basis." *Id.* at 648, 650. Clearly that function cannot be performed without reference to and incorporation of the contract.

We think that this situation is indistinguishable from the one faced by this court in Aktiebolaget Bofors v. United States, 90 U.S. App.D.C. 92, 194 F.2d 145 (1951), involving a Swedish Corporation, Bofors, which owned a trade secret used to manufacture a superior anti-aircraft gun. Bofors entered into a government contract which granted the United States an exclusive license to make and use the guns. After the United States began to reveal the trade secrets to others and after unsuccessfully attempting to obtain equitable adjustments through informal negotiations, Bofors instituted three suits, including one for damages and another for a declaratory judgment. District Judge Holtzoff dismissed the actions for lack of jurisdiction. In affirming, Judge Miller, speaking for the division, found that the gist of the actions was breach of contract:

> one who has lawfully acquired a trade secret may use it in any manner without liability unless he acquired it subject to a contractual limitation or restriction as to its use. In that event a licensee who uses the secret for purposes beyond the scope of the license granted by the owner is liable for breach of contract, but he commits no tort, because the only right of the owner which he thereby invades is one created by the agreement of disclosure. The owner could not maintain a suit against him for damages arising from unlicensed use without pleading and proving the contract. This being true, the gist of the owner's action is the breach of the licensing agreement.

Id. at 148 (footnotes omitted). IEC's complaint here is no different.[7]

In *Bofors*, Judge Miller also held that the APA did not provide jurisdiction to hear either the damage or equity suit and that jurisdiction lay in the Court of Claims. *Id.* at 149-50. We do not rest our present ruling on stare decisis, however, because the *Bofors* decision preceded the extensive jurisprudence in this circuit sustaining the APA as a basis of jurisdiction,[8] and thus it seems appropriate to analyze whether the district court fairly applied the APA and *Scanwell* to the claim of this government contractor. We think it did not.

First, clearly beyond peradventure, this case is not the type which falls within the rationale of our *Scanwell* holding. In *Scanwell,* we determined that a disappointed bidder on a government contract was a person aggrieved under the APA and had standing to seek a limited review of the contract award; we also held that where applicable the APA constituted a waiver of sovereign immunity. Although the sovereign immunity holding has relevance here, our

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[7] Clearly, the dispute on its face involves the Government's rights under the licensing agreement (contract) to IEC's trade secret. Even assuming the validity of the district court's finding of estoppel, *see* note 1 *supra,* the claim is still for breach of contract; under that theory IEC is alleging that the Government breached a licensing agreement which gave them the use of the data with limited rights.

[8] Peoples v. Department of Agriculture, 138 U.S.App.D.C. 291, 427 F.2d 561 (1970); Scanwell Laboratories, Inc. v. Shaffer, *supra; see* Pickus v. Board of Parole, 507 F.2d 1107 (D.C.Cir. 1974); Independent Broker-Dealers' Trade Ass'n v. SEC, 142 U.S.App. D.C. 384, 442 F.2d 132 (1971).

The district court was not apparently aware of the *Bofors* decision, for its opinions do not cite the case. Appellant relies upon it only as authority for a peripheral issue and actually only cites the district court opinion. *See* Appellant's Br. at 21 n. 11. Although part of the *Bofors* analysis was undercut by the cases cited above, the obvious pertinence of the *Bofors* ruling should have been called to the attention of the courts.

direct concern in *Scanwell* was standing, "whether legislation regulating governmental activity inures to the benefit of those tangentially affected." William F. Wilke, Inc. v. Department of Army, 485 F.2d 180, 183 (4th Cir. 1973). In contrast, while our focus in this case, as in *Scanwell,* is upon the same judicial review section of the APA, the question here is whether appellee has been aggrieved "by agency action;" our inquiry is to determine whether the decision by the contracting officer to strike IEC's limited rights designation constituted agency action.

Clearly, our *Scanwell* decision does not directly resolve that question. Conceivably, the interests identified in *Scanwell* which dictated a finding of standing may be applicable by analogy here and mandate a finding of agency action. In fact, this type of analysis appears to be the foundation of the district court opinions, especially the reliance upon the identification of an equivalent public interest as the one identified in *Scanwell*—the public interest in having contracts administered fairly and in preventing arbitrary and capricious decision-making by contracting officers. *See* 367 F.Supp. at 648; 361 F.Supp. at 823. However, we are extremely reluctant to give that factor the weight the district court attached to it in this situation. What has been identified unsurprisingly is the public's interest in minimizing the number of actions taken by contracting officers which results in breaches of governmental contracts and which may necessitate the payment of compensatory damages by the government. This interest, of course, is present in every decision made by an officer pursuant to a contract to which the Tucker Act applies.

The breadth of the district court's holding poses the greatest difficulty: to grant jurisdiction here by a finding of agency action would enable a district court to entertain a suit for injunctive relief each time a contracting officer makes a determination adverse to a private contracting party.

We simply do not think that such a result is mandated or that Congress intended to upset the carefully modulated waiver of sovereign immunity and grant of remedies for breach of contract embodied in the Tucker Act when it passed the APA. The Fifth Circuit, faced with this prospect in a case involving an injunction granted upon the basis of APA jurisdiction, refused to find such jurisdiction:

> Since the United States by reason of its nature acts only through agents, it is hard to conceive of a claim falling no matter how squarely within the Tucker Act which could not be urged to involve as well agency error subject to review under the APA. Little imagination is needed to foresee the consequences of a holding that such claims as they may be reviewed either in a court having power to grant equitable relief against the United States or in one having none. We refuse to believe that Congress intended, in enacting the APA, so to destroy the Court of Claims by implication.

Warner v. Cox, 487 F.2d 1301, 1306 (5th Cir. 1974). We join in that assessment.[9] We think it is clear that Congress did not intend that every action taken by an employee of a federal agency be within the ambit of the APA judicial review section. We also believe that in light of the long-standing Tucker Act remedy and the traditionally long-recognized interest in preventing piecemeal disruption of the procurement process, *e. g.,* M. Steinthal & Co. v. Seamans, *supra,* decisions made by contracting officers pur-

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[9] Appellee points to Universal Fiberglass Corp. v. United States, 400 F.2d 926 (8th Cir. 1968), as support for a finding of jurisdiction, asserting that in that case the Government was able to enforce a contract in district court. We cannot accept the IEC's argument that "*Universal Fiberglass* clearly establishes jurisdiction"; such an assertion indicates a complete lack of understanding of the real issues in this case—sovereign immunity and the extent of its waiver for contract actions.

suant to contract clauses fall outside the contemplation of the statute.[10]

Moreover, the APA itself states that judicial review is inappropriate where there exists some "other adequate remedy in a court." 5 U.S.C. § 704 (1970). We have held that the availability of a remedy in the Court of Claims is such an adequate remedy. Mohawk Airlines, Inc. v. C.A.B., 117 U.S.App. D.C. 326, 329 F.2d 894 (1964). The district court, however, concluded that damages would be an inadequate remedy, because of the speculative nature of damages in light of the Government's belief, as the only potential buyer, that the information is useless except for what not to do, and that injunctive relief would be appropriate in order to vindicate the public interest in proper contract administration. We have already concluded that this public interest factor should not be afforded the overriding weight that the district court gave to it. We further question whether damages are impossible to award. We see no barrier to the Court of Claims, if it decides that the Government has breached the contract, awarding IEC the

[10] Stripped of its plumage, this case is not too different than Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 702, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949). The dispute in *Larson* concerned interpretation of when payment was required upon a coal shipment. After receiving an unfavorable ruling from the War Assets Administration, plaintiff sued for equitable relief. The Court found that the suit was barred by sovereign immunity and noted:

> It is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. . . . The Government . . . cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract.

Id. at 704 69 S.Ct. at 1468. Similarly, we see no persuasive reason why IEC should not be limited to the alternative remedies Congress has already provided.

Finally, the bar of sovereign immunity prevents the district court from asserting jurisdiction through 28 U.S.C. § 1331. *Id.*

fair market value of its data. *See* Aktiebolaget Bofors v. United States, 153 F.Supp. 397, 139 Ct.Cl. 642 (1957).[11]

In sum, we find compelling reasons not to endorse the district court's analysis, but to reaffirm the vitality of our *Bofors* holding. IEC's claim is for breach of contract, and appellee should not be permitted to seek injunctive relief in the district court. Section 702 is inapplicable to this case and does not provide jurisdiction here. The case is reversed and remanded with instructions to vacate the injunction and dismiss the case for lack of subject matter jurisdiction.

So ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1192
SEPTEMBER TERM, 1974

Civil Action 927-73

INTERNATIONAL ENGINEERING COMPANY, DIVISION OF A-T-O, INC.

v.

ELLIOTT L. RICHARDSON, Secretary of Defense, et al., Appellants.

Before: TAMM and LEVENTHAL, Circuit Judges; JACK R. MILLER,* Judge U.S. Court of Customs and Patent Appeals,

[11] IEC has a further alternative remedy—before the General Accounting Office. Assuming that the Government wrongfully discloses the information, it still constitutes the only market for a LORAN system. In that event, the Comptroller General has the power to cancel future procurements made to competitors who wrongfully have acquired the information; IEC would then become the sole supplier of the product.

* Sitting by designation pursuant to Title 28 U.S. Code Section 293(a).

Order

On consideration of appellee's petition for rehearing, it is ORDERED by the Court that appellee's aforesaid petition is denied.

Per Curiam

For the Court:
/s/ HUGH E. KLINE
Huge E. Kline
Clerk

UNITED STATES COURT OF APPEALS
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Order

Appellee's suggestion for rehearing *en banc* having been transmitted to the full Court and no Judge having requested a vote thereon, it is

ORDERED by the Court *en banc* that appellee's aforesaid suggestion for rehearing *en banc* is denied.

For the Court:
/s/ HUGH E. KLINE
Huge E. Kline
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA

INTERNATIONAL ENGINEERING COMPANY, a Division of A-T-O,Inc., *Plaintiff*

v.

ELLIOT L. RICHARDSON ET AL., *Defendants.*

Civ. A. No. 927-73.

Oct. 24, 1973.

Memorandum Opinion

CHARLES R. RICHEY, District Judge.

Once again this case is before this Court on a Motion for a Preliminary Injunction filed by Plaintiff International Engineering Company (IEC).[1] In order to understand the reasons advanced by Plaintiff in support of its Motion, and the Court's reasons for granting thereof, a review of the history of this case will be helpful. The Court will summarize only briefly the history prior to its earlier decision. See International Engineering Company v. Elliot L. Richardson, et al., 361 F.Supp. 818, D.D.C. 1973.

I. HISTORY OF THE CASE

In late 1967, IEC conceived a system for guiding bombs or missiles with what is referred to by the parties as a LORAN C/D system. In February 1968, IEC submitted an unsolicited proposal to the Air Force that detailed the processes and the performance characteristics of the components as IEC had developed them at the time. This proposal, submitted with a restrictive legend that limited its

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[1] The Court reserves for future consideration Plaintiff's Complaint for Declaratory Judgment. The Court decides this Motion for Preliminary Injunction on the pleadings and briefs of counsel for the parties and upon able oral argument heard in open court on July 31, 1973.

distribution to Air Force personnel, resulted in the Government's award of a contract to IEC that called for Plaintiff to design and construct a "helicopter flyable breadboard LORAN Missile Guidance Subsystem." (See Plaintiff's Exhibit D, Defendant's Exhibit D). The system was to be constructed and furnished by IEC for the purposes of demonstration but was to remain the property of IEC; the information resulting from demonstration of the system was to be provided to the Government as set forth at Paragraph (b)4 of T-119 incorporated by reference into the DD1423 Test Report as follows:

> "(4) Description of test articles, including test configuration identification and photographs as appropriate." Defendant's Exhibit E.

The contract provision central to the instant dispute is the Rights in Technical Data clause, an Armed Services Procurement Regulation (7-104.9) incorporated by reference into the contract. Paragraph (b) of the Regulation provides in pertinent part that:

> "(1) The Government shall have unlimited rights in:
>
> "(i) technical data resulting directly from performance of experimental, developmental or research work which was specified as an element of performance in this or any other Government contract or subcontract; . . .
>
> "(ii) technical data necessary to enable manufacture of end-items, components and modifications, or to enable the performance of processes, when the end-items, components, modifications or processes have been, or are being developed under this or any other Government contract or subcontract in which experimental, developmental or research work is, or was specified as an element of contract performance, *except technical data pertaining to items, components*

> *or processes developed at private expense.*" (emphasis added).
>
> "(iv) technical data pertaining to end-items, components or processes which was prepared for the purpose of identifying sources, size, configuration, *mating and attachment characteristics, functional characteristics and performance requirements* ("form, fit and function" data, e.g., specification control drawings, catalog sheets, envelope drawings, etc.);" (emphasis added).
>
> "(2) The government shall have limited rights in:
>
> "(ii) technical data pertaining to items, components or processes developed at private expense, other than such data as may be included in the data referred to in (b)(1)(i), (iii), (iv), (v), and (vi); *provided* that each piece of data to which limited rights are to be asserted pursuant to (2)(i) and (ii) with the following legend in which is inserted the number of the prime contract under which the technical data is to be delivered and the name of the contractor or subcontractor by whom the technical data was furnished . . ."[2]

Paragraph (d) of the same regulation provides for the removal of unauthorized legends marked on data which the contractor delivers to the Government. The contract interpretation problem confronting the Court turns on the meaning attached to the term "substantiate" as it appears in paragraph (d) which is set forth as follows:

> "(d) Removal of Unauthorized Markings. Notwithstanding any provisions of the contract concerning inspection and acceptance, the Government may modify,

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[2] The legend as set forth in ASPR 7-104.9 appears in the full text of the regulation: 7-104.9 Right in Data, attached as Appendix I to this Opinion.

remove, obliterate or ignore any marking not authorized by the terms of this contract on any technical data furnished hereunder if—

"(i) the contractor fails to respond within sixty days to a written inquiry by the Government concerning the propriety of the use of the marking, or

"(ii) the Contractor's response fails to *substantiate* his contention that the use of the marking is authorized, in which case the Government shall give written notice to the Contractor." (emphasis added)

During the time frame for constructing the "Breadboard system" called for in the contract, January 1968 through June 1970, IEC developed an advanced circuitry LORAN C/D Navigation System, at what it alleges to be substantial private expense. As will be discussed in greater detail below, the Government disagrees on the material fact of whose money paid for the development of the Navigation System and argues that the system was developed through Government funding of the contract.[3] The Government's position on the question of funding was made known *after* the original contract had been modified twice to incorporate the Navigation System into other parts of a LORAN guided bomb and to run simulated tests on a computer, and *after* IEC had submitted several technical reports which contained a detailed description of the internal operations in terms of mathematical and logic diagrams of IEC's pre-contract components that the Air Force Project Engineer, Mr. Rustenberg, requested in the belief that the information would be helpful to the Air Force in evaluating the test results. (See Contracting Officer's Statement of Reasons for Decision of 2 October 1972; Rustenberg Deposition, pages 29, 34-36). Between October 1970 and November 1970

[3] The Court makes no finding as to this controverted and material fact. However, it is the Court's preliminary opinion that Plaintiff did develop the system at private expense, and this Opinion supports the likelihood of Plaintiff's success on the merits.

IEC submitted technical reports which contained "limited rights" legends intended to prevent the release of components' specifications to IEC's competitors. The Air Force never challenged the restrictive legend on the first report, 71-05. However, the first Contracting Officer assigned to the IEC contract questioned the appropriateness of restrictive marking placed by IEC on the second Technical Report, 70-06-4, on the grounds that the restrictive legend was of the kind used for proposals and not contract reports. IEC offered to delete the material altogether and simply comply with the limited requirements of the contract. IEC also submitted an amended proprietary legend. In July 1971 the Contracting Officer decided to accept the amended markings without further question for the following reason:

"the issuance of P0006 (a contract modification) directing a continuation of the effort initiated under P0003 (an earlier contract modification) constituted a tacit acceptance by the Government." (Exhibit 1 to Harsfield deposition).

In so deciding, the Contracting Officer chose to reject the request of the Contract Engineer, Mr. Rustenberg, that the restrictive legend be ruled improper under the terms of the contract. It is noteworthy that Mr. Rustenberg as early as March 1971 requested the proprietary data to facilitate the Air Force's evaluation of the test results. (Rustenberg Deposition, page 29).

Sometime before the submission of the third report, a new Contracting Officer, Mr. Harsfield, began work on the contract. Mr. Rustenberg served as technical advisor to the new Contracting Officer and on his behalf reviewed the third report. (Rustenberg Deposition, page 31). That report was accepted as submitted without immediate objection.

It was in October and December 1971 respectively that the third technical report and the final report on the original contract and all modifications were submitted and, like

the earlier reports, they contained the detailed descriptions of the components requested by Mr. Rustenberg and bore proprietary legends. At the end of December 1971 and almost nine months later in June 1972, the Contracting Officer sent letters to IEC recommending that IEC remove the proprietary markings or furnish substantiation to the contrary. IEC replied January 5, 1972 to the Contracting Officer's December 1971 correspondence but received no further response from the Government until a letter was received June 5, 1972, wherein the Contracting Officer stated that the IEC submission "fails to justify the use of their legend or show that any restriction is authorized." (See Plaintiff's Exhibit M). He further noted that the reports would be used with unlimited rights. IEC obtained an agreement on the part of the Air Force not to release the reports pending a meeting "to discuss the proprietary rights question." This meeting occurred June 26, 1972 and was conducted by Mr. Harsfield. During the course of the meeting, IEC submitted a three-page outline and made a two hour oral presentation which was deemed vague by the Contracting Officer who requested additional substantiation. At no time during the meeting did Mr. Harsfield question the IEC position. (Harsfield Deposition, pp. 76-77). Shortly thereafter, the Contracting Officer executed a final acceptance on the contract and final payment was made by the Air Force at the end of September 1972. The Contracting Officer received no further efforts at substantiation by IEC and, by letter dated October 2, 1972, informed the Contractor that the reports would be used by the Government with unlimited rights.

During January 1973 the Contracting Officer's decision was reviewed by personnel of the Headquarters, Air Force Systems Command, and of the Chief of Staff, United States Air Force and, later, by the Assistant General Counsel for the Air Force who requested that IEC submit further written material and that the Contracting Officer consider it. This material was submitted in IEC's letter dated Feb-

ruary 8, 1973 and failed to change the opinion of the Contracting Officer.

Plaintiff then brought this action to enjoin the Secretary of the Air Force from releasing the reports. In particular, IEC contended that it had met the burden of substantiating its proprietary claim as it interpreted the import of the term "substantiate." Plaintiff further argued that the Contracting Officer's failure to provide reasons for not agreeing with IEC's proprietary claim made it impossible to inveigh against his decision once further submissions were sought. Defendant responded by challenging the jurisdiction of the Court.

In consideration of Plaintiff's Motion for Preliminary Injunction and Defendant's Motion to Dismiss, the Court was confronted with close questions concerning the application of sovereign immunity and permissible review under the Administrative Procedure Act, 5 U.S.C. § 701 et seq. (1970). The Court's analysis led it to the conclusion that the APA provided a basis for subject matter jurisdiction and served as a waiver of sovereign immunity. Before turning to the question of the preliminary injunction, however, the Court determined that a statement of reasons by the Contracting Officer was essential to effective judicial review. Therefore the Court denied Defendant's Motion and took under advisement Plaintiff's Motion together with the contract terms and IEC's description of the Contracting Officer's actions upon which that motion was based. Rather than step blindly, and therefore dangerously, into a procurement operation foreign to the judicial process of conflict resolution, the Court remanded the case to the Contracting Officer for an explanation of his actions sufficient to permit the Court to proceed with its unique review of the contract dispute at bar. As an interim measure the Court requested and the Government agreed not to release the alleged proprietary data until the Court could review the Contracting Officer's statement of reasons and Plaintiff's

response thereto and rule on Plaintiff's Motion for a Preliminary Injunction.

The Court attempted through its Opinion and Order of July 10, 1973 to obtain the information necessary for effectively resolving what the Court perceived as, in essence, a familiar judicial problem of contract interpretation, but a problem uniquely situated in the Federal procurement field. In light of the information received pursuant to the Court's Order, the Court has had sufficient opportunity to probe the interrelated ASPR provisions, the contract terms and the positions of the parties to the extent that the Court believes Plaintiff's Motion for a Preliminary Injunction should be granted.

II. The Decision Herein To Grant Judicial Relief Is Within The Court's Discretion And Is Appropriate Where A Contracting Officer Abuses His Regulatory Authority

In view of the extraordinary relief the Court grants Plaintiff in its Order issued of even date with this Memorandum Opinion, it is necessary to air the Court's thoughts regarding the appropriateness of the action taken herein. Judicial forays into the procurement process are regarded with skepticism in this Circuit due in large part to the complexity of the rules and regulations governing procurement and the expertise required for efficient administration of the procurement process within the regulatory web. See M. Steinthal & Co. v. Seamans, 147 U.S.App.D.C. 221, 455 F.2d 1289 (1971). Our Court of Appeals in past decisions has highlighted the public interest in fairness and compliance with regulations in lawsuits brought by disappointed bidders on government contract, only to ultimately decide that this interest is outweighed by the public interest in efficient operation of government. See A. G. Schoonmaker Co. v. Resor, 144 U.S.App.D.C. 250, 445 F.2d 726; M. Steinthal & Co. v. Seamans, *supra*. The Court of Appeal's concern in these cases with the inefficiencies that obtain from

extensive review of contract awards prompted its determination that the District Courts should refuse to review appeals from contract awards where the highly subjective decision of a contracting officer who relied on specialized technical knowledge is in question. In light of this concern, the District of Columbia Circuit and the Fifth Circuit have held that where an agency or official other than the contracting officer reviews the latter's decision, courts will defer to administrative expertise. For example, see Allen M. Campbell Co. v. Lloyd Wood Construction Co., 446 F.2d 261 (5th Cir. 1971); A. G. Schoonmaker Co. v. Resor, *supra;* M. Steinthal & Co. v. Seamans, *supra.*

As the above cases and other procurement cases like them reflect courts' efforts to balance the competing interests that favor or oppose review, so does the history of this case demonstrate this Court's careful attempts to identify and balance the competing interests. That weighing of interests has led the Court to the opinion that the public interest, as well as Plaintiff's, is best served by granting Plantiff the injunctive relief it seeks.

In deciding to review IEC's claim under the Administrative Procedure Act, *supra,* the Court relied on the landmark decision by the United States Court of Appeals in Scanwell Laboratories, Inc. v. Shaffer, 137 U.S.App.D.C. 371, 424 F.2d 859 (1970). In *Scanwell,* the Court of Appeals held that disappointed bidders for government contracts have standing under the A.P.A., 5 U.S.C. § 701(a)(2) (1970), to bring suit for declaratory and injunctive relief in order to determine the validity of the agency's actions. Although *Scanwell* involved disappointed bidders whose legal rights when denied a contract were somewhat unclear and the instant case concerns a party under contract with the government and possessing definite contractual rights, it is the Court's opinion in the setting of this case that review should be made available to both "potential sellers and

those already under government contract,"[4] and that an appropriate remedy should be made available "to correct [governmental] overreaching."[5] Like the Court of Appeals' decision in *Scanwell* to abandon the traditional refusal of courts to intervene in the procurement process, the Court's decision to intervene here is supported by two interests: first, the interest in IEC as an individual allegedly harmed by illegal, arbitrary and capricious action by the contracting officer; and second, the interest of the public, represented by IEC as a "private attorney general," in having government contracts administered fairly and according to the regulations. Only if contractors are assured fair and equitable treatment by contracting officers can the long-term integrity, economic welfare and efficiency of the procurement process be advanced.

Thus the Court regards this suit as one brought, in part, in the public interest to prevent arbitrary or capricious decision-making in the administration of government contracts and, particularly, *to restore the role of the contracting officer to one who tests evidence by procedures sufficiently adversary in nature to provide a reasonable guarantee of its reliability.* See Scanwell Laboratories, Inc. v. Shaffer, *supra;* Mobile Oil Corporation v. Federal Power Commission, D.C.Cir., 483 F.2d 1238, 1973. It is no longer reasonable for courts to take the position that regulations governing contracting are for the protection of the government and the public and not for the protection of those who bid for and perhaps obtain contracts with government.[6] The public interest cannot turn solely on efficient procurement, but has to fasten on the fairness and integrity along

[4] Levanthal, "Public Contracts and Administrative Law," 52 ABAJ 35, 38 (1966).

[5] *Id.*

[6] See "Governmental Contract Bid Protests: Judicial Review and The Role of the Court of Claims," 39 Chicago Law Review 84 (1973).

with the efficiency of the procurement process which at this point in this country's history accounts for payments amounting to more than one-half of all federal expenditures.[7] Negotiated contracts like IEC's provide more than half the dollar value of all federal procurements [8] and upwards of 85% of the dollar value of military procurements.[9] In view of the mushrooming economic development of the procurement process, the Court has determined that the public interest would be best served by a limited and expedited review of the government's administration of the IEC contract, notwithstanding the delay in the completion of the government's feasibility studies in this defense area. The government has noted in its submissions to the Court that IEC's components are technologically undesirable and have no practical value to the government aside from providing future government contractors with a blueprint of what *not* to do. In light of the purpose to which the government intends to put the data in question, the Court is of the opinion that review of this suit in no way delays procurement for the national defense.[10] For the aforementioned reasons, the Court believes this case "calls for an assertion of an overriding public interest 'in having agencies follow the regulations which control government contracting.'" M. Steinthal & Co. v. Seamons, *supra,* 147 U.S.App.D.C. 221, 455 F.2d 1289, quoting Scanwell Laboratories v. Shaffer, *supra,* 424 F.2d at 864.

[7] U.S. Department of Commerce, Statistical Abstract of the United States 374, table 574 (1970).

[8] See "Government Contract Bid Protests," *supra,* 39 Chicago Law Review at 816, footnote 10, where the author refers to the Subcommittee on Federal Procurement and Regulation of the Joint Economic Committee, 89th Congress, 1st Sess., Background Material on Economic Impact of Federal Procurement 21 (1966).

[9] *Id.*

[10] Therefore, the Court has decided that those bidder suits where Courts have refused to delay national defense procurement are not controlling. See A. G. Schoomaker Co. v. Resor, *supra,* City Chemical Corp. v. Shreffler, 333 F.Supp. 46 (S.D.N.Y. 1971); American Standard, Inc. v. Laird, 326 F.Supp. 492 (D.D.C. 1971).

It is within this Court's discretion to refuse to entertain a suit for injunctive relief in light of the potentiality of a damages remedy in the Court of Claims. M. Steinthal & Co. v. Seamans, *supra*. However, the Court doubts both the likelihood and adequacy of a damages remedy in the Court of Claims. An effective remedy in damages arguably would be IEC's lost profits from unauthorized disclosure of its trade secrets. See Uniform Commercial Code § 2-708(2) (1972 edition). However, there are few satisfactory methods to measuring the value of losses resulting from the unauthorized disclosure of trade secrets. See Precision Plating & Metal Finishing, Inc. v. Martin-Marietta Corp., 435 F.2d 1262 (5th Cir. 1970); Appeal of Joanell Laboratories, Inc., 72-1 BCA par. 9218. Especially where the only potential buyer of products related to IEC's trade secrets refuses to recognize any practical value in the goods themselves. Most importantly, however, the Court is convinced that irreparable injury would result from the unauthorized disclosure of IEC's trade secrets. Therefore, it is not significant whether or not plaintiff could avail itself of damages to some amount not measured by anticipated profits through successful adjudication of its rights in the Court of Claims. It seems more important that IEC be able to obtain the injunctive relief which the strength of its claim merits, but which the Court of Claims cannot provide. See United States v. King, 395 U.S. 1, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969). The Court's decision to proceed with its review of Plaintiff's motion for a preliminary injunction in light of the recent submissions to the Court by the parties in this case, particularly the statement of reasons provided by the contracting officer and his deposition, is within its discretion and consistent with the viewpoint expressed by the Court of Appeals in M. Steinthal & Co. v. Seamans, *supra*, where Judge Leventhal suggested the appropriateness of intervention by the District Court in certain circumstances:

> "To avoid any confusion, it is not being stated here that the damages available to the disappointed bidder, which do not comprehend anticipated profit, are automatically an 'adequate' legal remedy as to warrant dismissal for want of equity of every injunction action regardless of the strength of plaintiff's claim on the merits." 455 F.2d at 1302 (1970).

III. The Scope of Review and the Nature of Relief Granted

The absence of case law regarding the appropriate standard of review in a procurement dispute like the case at bar presents the Court with two alternatives: (1) apply the most appropriate Administrative Procedure Act standard of review; or (2) evaluate the merits of the case in accordance with settled principles of contract law. See United States v. Little Lake Misere Land Co., Inc., 412 U.S. 580, 93 S.Ct. 2389, 37 L.Ed.2d 187 (decided June 18, 1973). At this stage in the litigation the Court need not decide the merits. However, the appropriate standard of review takes on significance in its limited application within the judicial guidelines for issuing preliminary injunctive relief. The standards for granting preliminary equitable relief are set out in Virginia Petroleum Jobbers Assn. v. FPC, 104 U.S. App.D.C. 106, 259 F.2d 921, 925 (1958). Among those standards is the requirement that there be a likelihood of plaintiff's success on the merits. (See page 651 infra). In order to best apply the criteria set forth in *Virginia Jobbers,* the Court shall undertake to evaluate the merits of IEC's claims under the appropriate APA standard as well as under accepted contract law principles.

Although this Court relied on the decision in *Scanwell* and the controlling interests identified therein in deciding the appropriateness of review in the case at bar, the Court is unable to glean from *Scanwell* a clear articulation of the scope of review appropriate to the case at bar. Therefore the Court looks initially to the Administrative Procedure Act for standards applicable to the review of the instant complaint which challenges the Contract Officer's contract

interpretations and the actions he has taken in response to those interpretations. Fortunately, the Act provides standards that are applicable to the instant dispute.[11] The review section of the APA insulates certain agency actions from review "to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701 (1970). However, the interpretation given § 701 in this Circuit provides this Court with a good deal of latitude in determining the extent to which a statute or regulation operates to make a discretionary decision unreviewable, particularly where, as here, a procurement regulation authorizes a discretionary determination by the contracting officer. See Wheelabrator Corp. v. Chafee, 147 U.S.App.D.C. 238, 455 F.2d 1306, 1311-1312 (1971); Blackhawk Heating & Plumbing Co. v. Driver, 40 U.S.App. D.C. 31, 433 F.2d 1137 (1970).

Several procurement cases in which courts have treated questions of governmental overreaching find their genesis in circumstances where the government accepts one bid over another or decides to cancel a contract. In both situations the contracting officer, or the Secretary of the instant agency depending upon the particular setting, takes action pursuant to an express statutory mandate. See M. Steinthal and Co. v. Seamans, *supra;* Udall v. Littell, 125 U.S.App. D.C. 89, 366 F.2d 668 (1966); Littell v. Morton, 445 F.2d 1207 (4 Cir., 1971). The approach of the courts in those cases is apposite to the instant dispute involving the exercise of administrative discretion pursuant to an Armed Services Procurement Regulation incorporated by reference into the IEC contract. Without question the relevant regulation, ASPR 7-104.9, commits the interpretation of the Technical Rights in Data Clause to the contracting officer.

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[11] Quite obviously in deciding to review this case and in determining that particular APA standards are applicable, the Court makes clear its position that in no fashion can a government contract shelter a contracting officer, who at all times is an agent of the government, from some standard of accountability under the APA.

(See Appendix). With respect to his interpretation, therefore, the Court may not directly review its legal propriety. The Act commands that courts refrain from such review where legal interpretation is entrusted to the agency, 5 U.S.C. § 701. However, the Act expressly provides that the courts "shall . . . hold unlawful, . . . agency actions, findings and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this provision, the Court must undertake a limited review of the contracting officer's *decisions* rendered pursuant to the Rights in Data clause to determine whether it is likely that he acted arbitrarily and without a rational basis. Udall v. Littell, *supra;* M. Steinthal & Co. v. Seamans, *supra.*

The above background is important to an understanding of the issues related to the Court's decision to issue a preliminary injunction, particularly the issue whether there is a likelihood that IEC will prevail on the merits. That issue along with several others is determinative of plaintiff's motion for a preliminary injunction. In Virginia Petroleum Jobbers Assoc. v. FPC, 104 U.S.App.D.C. 106, 259 F.2d 921 (1958), the United States Court of Appeals for the District of Columbia Circuit set forth four criteria to consider in deciding whether to issue a preliminary injunction. They are as follows:

> (a) That the petitioner has a strong likelihood of prevailing upon the merits;
>
> (b) That the petitioner would be irreparably injured without such relief;
>
> (c) That the stay or injunction would not substantially harm other interested persons;
>
> (d) That the public interest will not be significantly harmed.

In addition to these four criteria governing the issuance of a preliminary injunction, the Court's consideration of the government contractor's claim should draw upon two

interrelated principles articulated by Judge Leventhal in M. Steinthal & Co. v. Seamans, *supra,* which apply where determinations of procurement officials are before the Court:

> "(1) courts should not overturn any procurement determination unless the aggrieved bidder demonstrates that there was no rational basis for the agency's decision; and (2) even in instances where such a determination is made, there is room for sound judicial discretion, in the presence of overriding public interest considerations, to refuse to entertain declaratory or injunctive actions in a pre-procurement context." 455 F.2d at 1301.

The government contends that the *Steinthal* principles severely limit this Court's choice to apply the public interest values of *Scanwell* to the facts of the case at bar. The Court respectfully disagrees. The instant dispute is clearly one of the "meritorious sheep" as described by the Court of Appeals in *Scanwell, supra,* 424 F.2d at 872. After a careful examination of the IEC contract and the extensive memoranda, affidavits and depositions filed in this law suit, it is the Court's conclusion that the contracting officer and his organization or staff violated the statutory boundaries set by ASPR 7-104.9, and that the contracting officer in an arbitrary and cavalier manner arrived at a determination which is not reasonable.

A. Plaintiff Has A Likelihood of Success On the Merits

IEC is before the Court seeking equitable relief in a stringent form against government action. In these circumstances IEC's burden is heavy indeed and the Court must restrict its inquiry to a determination of whether the decisions of the contracting officer had a reasonable basis, or appear to have had a reasonable basis for purposes of IEC's motion. The lessons taught by the bidder suits instruct the Court to "fully take into account the discretion that is typ-

ically accorded officials in the procurement agencies by statutes and regulations." M. Steinthal & Co. v. Seamans, *supra,* 455 F.2d at 1301. In Wheelabrator Corp. v. Chaffee, 147 U.S.App.D.C. 238, 455 F.2d 1306 (1971) the Court of Appeals further commented:

> "In view of the public interest in expeditious procurement a preliminary injunction cannot be justified unless the court makes a considered judgment of a probability of success on the merits. Likelihood of success is a requirement of an injunction even though the court's probing and analysis may not be as comprehensive when its injunction is limited to the period required for a determination by the GAO on the protest." 455 F.2d at 1317.

The Court has given the closest consideration to the facts presented and determined that IEC has sufficiently demonstrated its probability of success on the merits. It is clear to the Court that the contracting officer's process of decision-making in this instance was contrary to the ASPR requirements that contracting officials make a meaningful inquiry and good faith effort in the exercise of their discretion. Consequently, it was no accident that the contracting officer's final decision to obliterate the restrictive legend on three IEC Reports and authorize the use of all the reports with unlimited rights was unsupported by evidence and reflected legal conclusions that appear incorrect as a matter of law.

The integrity of the procurement process turns on the responsiveness of contracting officials to follow the regulations in a manner that insures free and fair competition. See A. G. Schoonmaker v. Resor, 144 U.S.App.D.C. 250, 445 F.2d 726 (1971). In the area of advertised bid procedures, for example, the contracting officer's discretion is canalized through a regulatory structure setting forth the criteria he should consider and the procedures he must fol-

low in awarding a contract. See 32 C.F.R. § 1.300-2 (1972); 41 C.F.R. §§ 1-1.301-2, 1-2.102(a). Since the contracting officer's decisions as to whether a bidder is "responsive" to a bid invitation or "responsible" to the extent that he can be expected to satisfactorily perform the contract require the contracting officer to make subjective judgments, courts demand high standards of performance within the regulatory guidelines to prevent against fraudulent or collusive contract awards. See Wheelabrator Corp. v. Chafee, *supra.* It is the Court's opinion that the degree of care with which a contracting officer awards a contract should presage the exactitude with which he and other contracting officials issue decisions during the course of the contract's administration.

1. *The Decision of the Contracting Officer to Strike Plaintiff's Restrictive Legend Is Illegal Since It Did Not Comport With the Minimal Due Process Requirements of ASPR 7-104.9(d).*

The Court's concern here is with the contracting officer's decision that IEC failed to "substantiate" or "show" the propriety of the use of a limited rights legend on the data it submitted in connection with reports 70-06-04, 70-07 and 70-09. The Air Force is prevented from removing such legends or treating the data in issue with "unlimited rights" until the contracting officer determines that the contractor has failed to "substantiate his contention that the use of the marking is authorized" and the officer provides "written notice" of such determination to the contractor. It is clear to the Court that the contracting officer never reached an independent decision with respect to IEC's efforts to substantiate the use of the restrictive legend and therefore never made available to plaintiff a meaningful notification of his decision that comported with the requirements of procedural due process such that plaintiff could adequately challenge the decision either in its dealings with the contracting officer or in an appeal to the Secretary of the Air Force.

In the case at bar, Contracting Officer Harsfield, the second of the two contracting officers on the IEC contract, appears to have relied entirely on his advisors, particularly Mr. Rustenberg, with the result that Mr. Harsfield's decision was not made on the basis of the evidence before him but on the untested opinion of his advisors. (See Harsfield Deposition, pp. 76-77, 118-119; Rustenberg Deposition, pp. 63-65). Most importantly, that opinion was not provided to IEC as required by the notification requirement of the ASPR in issue. Insofar as the Contracting Officer relied on Mr. Rustenberg's definition of "function" as it appears in paragraph (b)(1)(iv) of the Rights in Technical Data clause of the contract to determine that IEC had failed to substantiate its right to place a restrictive legend on the data, Mr. Harsfield's decision was unreasonable and unsupported by the record before him. It does not appear to the Court that a determination of what comes within the term "form, fit and function" enjoys a breadth of discretion drawing on technical expertise. Rather, the Contracting Officer's range of interpretations was limited by the Schedule of the Contract which provides an understanding of the nature of the data for which the Government contracted. In reviewing the items specified for inclusion in the Final Test Reports, it is apparent to the Court that the plain meaning of items described excludes without question an integral design of the IEC system. The Schedule of the Contract makes reference to an attached DD Form 1423 that discussed the data IEC was required to deliver. The pertinent part of that form is Data Item A002, Test Reports Development, which explains the applicability of Data Item description T-119 which, in turn, specifies items to be included in the Final Test Reports. With respect to IEC's hardware used in the test, that is, IEC's processes and components themselves, T-119 calls for data as follows:

> "Description of Test Article, including test configuration identification and photographs as appropriate."

The description of the "test article" is defined under the heading Description of Test Apparatus found in Mil-Std-831 (Defendants' Exhibit F):

> "5.6.10.1.1. Description of test apparatus. A description of test apparatus shall include a tabulation of all instruments and equipment used, the manufacturers' names, serial numbers, raises, accuracy, and dates of latest calibration."

Thus IEC was expected to identify the components of the system it was testing but under no reading of the above could IEC be required to describe the internal operations, the mathematical equations and logic diagrams, of the test hardware. Yet that was Mr. Rustenberg's conception of the data requirements as adopted by the Contracting Officer.

The Contracting Officer's letters of December 28, 1971, June 5, 1972 or October 2, 1972 suggested to IEC, that plaintiff had not substantiated its right to mark the reports with restrictive legends. Therefore, IEC chose to respond to each of those letters with a further attempt to establish by the existence of competent evidence that IEC developed the LOMISS processes and components at its own expense prior to the inception of the contract. It seems that the reasonableness of Plaintiffs' efforts to convince the contracting officer of the rightness of its position was negated by failure of the Contracting Officer or his aides to reveal their conviction that IEC was required to deliver the data in which it asserted proprietary rights, in part, because of opinions such as the following: "significant testing of Unit B occurred under Contract Modifications P0003 and P0006, and . . . the precontract flight testing were only demonstrations intended to obtain funding for significant and necessary testing." (Statement of Reasons for Contracting Officer's Decision of 2 October 1972, page 5). This speculation on the part of the Contracting Officer is based on Mr. Rustenberg's impression that the testing of one IEC system, "Unit B", before the contract Modification P0003 was awarded, was

not successful and only reached a satisfactory level of performance during subsequent tests that in part were accomplished at government expense. This theory of Mr. Rustenberg has been adopted by the Contracting Officer though there has never been a factual underpinning provided. Furthermore, this opinion was never suggested to Plaintiff so that IEC might test it in an adversary manner which the Court believes appropriate.

The theory of Mr. Rustenberg appears to the Court to have been the overriding basis of the Contracting Officer's final decision on October 2, 1972. Yet Mr. Rustenberg's theory had no foundation in facts gathered in the course of IEC's efforts to substantiate its claims. Indeed, IEC was never advised that its efforts to demonstrate the development of its processes and components at private expense were futile in that the data in question was considered by the Contracting Officer to be the product of federally funded testing, which would preclude that opportunity to place restrictive legends on data submitted pursuant to the contract.

Where the Contracting Officer makes a discretionary determination based upon his reading of the contract and the field reports of his aides, the due process requirements of the ASPR demand at the least that the Contracting Officer independently review any staff opinion he adopts, that he have a factual basis for his subjective reasons, and that he notify the contractor accordingly. Here he had none, and no adequate notice was provided. Instead his subjective analysis began and ended with the unsubstantiated opinion of the contract engineer. The Court must reject the decisional process and the conclusions it generated unfair, unreasonable, and violative of the minimal due process requirements of ASPR 7-104.9(d).

Thus the Court regards the contracting officer's ultimate decision to strike plaintiff's legend as violative of procedural due process requirements insofar as the instant regulation on its face requires the contracting officer to reach an

independent decision that IEC's restrictive legend "was not permitted by the terms of the contract" and to make the basis for that decision known to IEC. Although the Court does not reach the issue, it is important to note that ASPR 7-104.9(d) is seriously lacking in adequate standards for striking a restrictive legend and in adequate procedures including notice of specific objections by the contracting officer, opportunity to present evidence and to cross-examine adverse witnesses. In addition, the regulation does not provide for administrative findings and conclusions on the record made before the contracting officer. By requiring a statement of reasons and meaningful compliance with the notification requirement by the contracting officer, the Court in this case, hopefully, has moved the procurement process closer to conformity with due process of law.

However, it is the Court's concern that an ASPR, which purports to authorize a contracting officer to strike a contractor's restrictive legend from data in which the contractor claims a significant property interest, should provide procedures consistent with the requirements of procedural due process under the Fifth Amendment to the United States Constitution. Since the striking of a contractor's restrictive legend for data to which the contractor claims a property interest and the subsequent delivery of the data to the contractor's competitors constitutes an adjudication of the contractor's proprietary interest by the contracting officer, adequate notice and a full hearing would seem appropriate. *See* Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971); Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed. 8d 349 (1969); Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); Perry v. Sinderman, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); and Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 270, 33 L.Ed.2d 548 (1972).

Finally, notwithstanding the due process violations by the contracting officer noted above, the Court believes IEC met the regulatory test of substantiation. Although the Court can accept the Government's definition that "substantiate" means "to establish the existence of true or competent evidence", the Court is inclined to agree with IEC that Plaintiff indeed provided competent evidence to the extent that IEC could appreciate what the Contracting Officer was searching for. IEC attempted to document in a written history the development of the processes and components alleged to have been developed at IEC expense. An Indepnd-ent Audit Report was included. This evidence supported the proposition that IEC incorporated its processes into certain components which existed as identifiable hardware prior to July 1969 and independent of any Government funding. (See Independent Audit Report, Rustenburg Deposition, page 5).

The Court is on firm ground in interpreting the import of the term "substantiate" in a different manner from the Contracting Officer, even if such a reading is contrary to the intention of the Government's draftsman:

> "If the Government had contracted with either Steinthal or Pioneer and a dispute had arisen over the meaning of the delivery schedule, the court would have been faced with a familiar judicial problem of contractual interpretation; it might decide that, regardless of the intention of the Government's draftsman, the amended IFB gave the contractor a reasonable latitude as to the time of delivery. Such a decision might very well be upheld by this court since it involves the resolution of a contractual ambiguity, and under familiar legal doctrine a court may well construe a provision strictly against the Government draftsman, giving the benefit of any doubt to the private party who did not draft the particular provision." M. Steinthal & Co. v. Seamans, *supra,* 455 F.2d at 1303.

It is the Court's opinion that Plaintiff met the burden of substantiating the propriety of the limited rights legend claim, as IEC understood that burden at the time the contract was made.

2. *The Government Is Estopped from Denying the Propriety of Restrictive Legends Appearing on Final Reports Submitted by IEC Subsequent to the Government's Acceptance of Report 70-06-04.*

The important question raised by the Contractor here is whether the Government has an unlimited right to use and disclose to others for their use detailed design data relating to IEC processes and components allegedly prepared independent of the contract funding and submitted to the Government independent of any contract requirement but as a cooperative response to the request of the Contract Project Engineer. With respect to the above question, the Court assumes as a threshold matter that the Government obtained rights, either "limited" or "unlimited," only in the technical data which the Government specified was to be delivered under the contract. The Court refers the reader to Section III, page 652, of this Opinion and where the Court concluded that the Air Force did not order detailed design data of any of the components of either of the systems tested under the contract. Accordingly, the Government did not acquire any rights in data submitted by IEC with restrictive markings that was not part of the data ordered in the contract.

However, the Air Force did obtain possession of the alleged trade secrets as a result of IEC's response to Mr. Rustenberg's request. It is not clear whether the Air Force through Mr. Rustenberg repeated its request for design specifications at the time for submission of each Final Technical Report, however, IEC included the data each time and marked it with restrictive legends. It is the Court's opinion that even in the absence of evidence supporting an express agreement of nondisclosure, IEC's delivery of the

data with restrictive legends supports the existence of an implied understanding that the data was received in confidence. It is well settled that in the presence of an implied agreement the Government is liable for the unauthorized use and disclosure of proprietary data. See Horner v. United States, 86 F.Supp. 132, 114 Ct.Cl. 612; Comp.Dec. B-155885, May 1965.

IEC contends that the restrictive legends demonstrate its intention not to deliver the detailed proprietary data to the Air Force with unlimited rights and that the Air Force had no reason to believe otherwise. Plaintiff's position is supported by IEC's effort to obtain the return of its data by revising and resubmitting the Reports containing the challenged markings. In IEC's letters of June 14, 1971 and January 5, 1972, respectively, IEC explained to the Air Force its offer to revise Report 70-06-04 and made clear its intention to retain a restrictive rights interest in the technical data to which it attached a restrictive rights legend in Reports 70-06-04, 71-07 and 71-09. The Air Force never responded to IEC's June 15, 1971 letter but accepted the Report 70-06-04 and paid for it. As a consequence of the Air Force's failure to respond to that letter and the Air Force's decision to issue a Modification to the Contract, Mod. P0006, IEC concluded that the Air Force regarded the restrictive legend on Report 70-06-04 to be proper. IEC proceeded to submit the same data with the appropriate restrictive legends in the next two reports in reliance on the Air Force's informed acquiescence in Plaintiff's assertions regarding Report 70-06-04. The Court believes Plaintiff's reliance to have been justified in light of the Contracting Officer's position upon accepting the report (See Exhibit 1 to Harsfield Deposition). The Government's actions and Plaintiff's reliance thereon have the effect of legally estopping the Government from claiming that the restrictive rights legends submitted on the Reports filed after acceptance of 70-06-04 are improper.[12] Equitable es-

[12] The Government argues that acquiescence is legally irrelevant since the Contract Right in Technical Data clause, paragraph (d),

toppel prevents the Government's assertion of rights which might have existed had not the Government's conduct rendered it inequitable for this Court to permit the Government to assert these rights against IEC. See Manloading & Management Assoc., Inc. v. United States, Ct.Cl., 461 F.2d 1299 (1972).

B. Plaintiff Would Be Irreparably Injured With Such Relief.

The Court has concluded that IEC will be irreparably injured if the Government releases the technical data containing IEC's LOMISS processes and components to the public. In taking the position that it is entitled to the data marked with restrictive legends, the Government has conceded the information is of a kind that would permit competitors to reproduce, or as the Government desires, stay far away from producing the IEC processes and components in issue. Obviously, the release of such detailed data would destroy any competitive advantage presently held by IEC. The harm to IEC by public disclosure is found in the irrevocable loss of a competitive advantage and uncompensable economic hardship. The Court balances this with the administrative burden the Government has complained of in its review of proposals as a result of the delay occasioned by this Court's review of the alleged unfairness in the Contracting Officer's decision. The scales weigh decisively in granting Plaintiff the preliminary relief it seeks. Only a cry of "national security" would turn this Court from its purposeful review of the decision-making process in question here. See Horne Brothers, Inc. v. Laird, 150 U.S.App.D.C. 177, 463 F.2d 1268 (1972).

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provides that the Government's acceptance of data does not preclude the Government from obliterating any marking not authorized by the terms of the contract. The Court views the Government's acquiescence as relevant, indeed, since it resulted in IEC's reasonable reliance. Accordingly, the Government is estopped from asserting the otherwise valid rights set forth in paragraph (d). See 3 Pomeroy, Equity Jurisprudence, § 802 at 180 (5th Ed. 1941).

C. This Injunction Will Not Substantially Harm Other Interested Persons

The Government contends that the other defense contractors are restless over the delay in the Government's consideration of their proposals, while it awaits this Court's determination regarding who presently has title to IEC's alleged proprietary data. It is the Court's opinion that defense contractors would experience considerably less anxiety if they were to be assured through the actions of this Court that the Government will not be permitted to act in an arbitrary manner where the protection of their trade secrets hangs in the balance. These contractors must have an extensive interest in the degree to which a contracting official will be permitted to determine that information turned over to government officials in the course of a contract as part of an effort to cooperate with their review of the contractor's work can be released to competitors despite restrictive legends affixed to the information at the time it was submitted.

The interest the Court seeks to safeguard here is central to the welfare of the procurement process as reflected in the Armed Services Regulation set forth below. The Government and the contractors will benefit in the long run from the Court's thorough application of the policy considerations which underlie ASPR 9-202.1, set forth in pertinent part as follows:

"¶ 9-202.1 *Background.*

"(c) *The Balancing of Interests.* It is apparent that there is no necessary correlation between the Government's need for technical data and its contractors' economic interests therein. However, in balancing the Government's requirements for technical data against the contractor's interest in protecting his data, it should be recognized that there may be a considerable identity of interest. This is particularly true in the case of innovative contractors who

can best be encouraged to develop at private expense items of military usefulness where their rights in such items are scrupulously protected. It is equally important that the Government foster successful contractual relationships and encourage a ready flow of data essential to Government needs by confining its acquisitions of technical data to cases of actual need. Certainly the Government must not be barred from bargaining and contracting to obtain such technical data as it needs, even though that data may normally not be disclosed in commercial practice. Moreover, when the Government pays for research and development work which produces new knowledge, products or processes, it has an obligation to foster technological progress through wide dissemination of the new and useful information derived from such work and where practicable to provide competitive opportunities for supplying the new products and utilizing the new processes. At the same time, acquiring, maintaining, storing, retrieving, and distributing technical data in the vast quantities generated by modern technology is costly and burdensome for the Government. For this reason alone, it would be necessary to control closely the extent and nature of data procurement. Such control is also necessary to insure Government respect for its contractors' economic interest in technical data relating to their privately developed items. The policies and procedures of this Part are framed in the light of these considerations."

D. Public Interest Will Be Served.

The Court's comment in General Electric v. Seamans, 340 F.Supp. 636 (1972), is equally applicable here:

> "There is little doubt that the overriding public interest lies in having the governmental agencies follow their own regulations. Scanwell Laboratories, Inc., *supra,* at 424 F.2d 864." 340 F.Supp. at 641.

This case concerns the manner in which contracting officials make discretionary determinations in their administration of government contracts. It is imperative that such decisions reflect a fair and objective consideration of the contract itself along with any questioned actions taken by the parties pursuant to contract terms from which the dispute issues. Procurement activities cannot be allowed to "deteriorate into actions reflecting personal predilictions of administrative officials, whether ascribable to whim, misplaced zeal, or impermissible influence." Steinthal v. Seamans, *supra,* 455 F.2d at 1305. The facts here indicate that the Contracting Officer at the time of his decision in question had responsibility for 110 contracts involving a total of half a billion dollars, of which the IEC contract accounted for less than 1% of his workload. For that reason, the Government contends that the Contracting Officer was entirely reasonable in relying so fully on the suggestions of his advisors. The court must fault such "organizational" decisions whose roots are precariously implanted in the quicksand of speculation. (See page 653, *supra*). It is unreasonable for the Contracting Officer to accept unsubstantiated opinions of his advisors without testing them for their adversariness. It is in the public interest that reason and not convenience be the basis for a Contracting Official's decision.

IV. Conclusion

The critical decision-making stage for resolving disputes arising under the Rights in Technical Data clause of any Governmental contract is at the contracting officer level. That is the intent of the Armed Services Procurement Regulations. Therefore it is of absolute necessity that contracting officers make decisions in a fair and reasoned fashion. In circumstances like those before the Court where a contracting officer relies upon the unsubstantiated and untested opinions of his advisors, he betrays the basic consideration of fairness which this Court demands of

Government officials acting pursuant to administrative regulations. In addition, such reliance by a contracting officer effectively shields the questionable opinion from adequate testing by accepted principles of procedural due process. In the field of procurement, unless courts require of contracting officers no less than the fairness referred to above, small contractors will never be able to test the decisions of the contracting officer when, as here, the contractors cannot avail themselves of any administrative remedies.

For the above reasons, the Court has decided to grant IEC the preliminary injunction it seeks.

In addition to this Opinion, the Court, this day, the 23rd of October, 1973, has entered Findings of Fact and Conclusions of Law and a separate Order.

APPENDIX

7-104.9 *Rights in Data*

(a) *Basic Data Clause.* In accordance with 9-203, insert the following clause

RIGHTS IN TECHNICAL DATA (1965 FEB)

(a) *Definitions*

(1) *Technical Data,* as used in this clause, means technical writing, sound recordings, pictorial reproductions, drawings, or other graphic representations and works of a technical nature, whether or not copyrighted, which are specified to be delivered pursuant to this contract. The term does not include financial reports, cost analyses, and other information incidental to contract administration.

(2) *Limited Rights* means rights to use, duplicate, and disclose technical data in whole or in part, by or for the Government, with the express limitation that such data may not be released outside the Government, used, duplicated, or disclosed in whole or in part, for manufacture or procurement, except for:

> work by or for the Government where the item or process concerned is not otherwise reasonable available to enable timely performance of the work; and as the interests of the United States may require;

provided, in either case, that the release of such data shall be subject to the limitations of this paragraph (2).

(3) *Unlimited Rights* means rights to use, duplicate or disclose technical data, in whole or in part, in any manner and for any purpose whatsoever, and to have or permit others to do so.

(b) *Government Rights.*

(1) The Government shall have unlimited rights in:

(i) technical data resulting directly from performance of experimental, developmental or research work which was specified as an element of performance in this or any other Government contract or subcontract;

(ii) technical data necessary to enable manufacture of end-items, components and modifications, or to enable the performance of processes, when the end-items, components, modifications or processes have been, or are being, developed under this or any other Government contract or subcontract in which experimental, developmental or research work is, or was specified as an element of contract performance, except technical data pertaining to items, components or processes developed at private expense (but see (2) (ii) below);

(iii) technical data constituting corrections or changes to Government-furnished data;

(iv) technical data pertaining to end-items, components or processes which was prepared for the pur-

pose of identfying sources, size, configuration, mating and attachment characteristics, functional characteristics and performance requirements ("form, fit and function" data, e. g., specification control drawings, catalog sheets, envelope drawings, etc.);

(v) manuals or instructional materials prepared for installation, operation, maintenance or training purposes;

(vi) other technical data which has been, or is normally furnished without restriction by the contractor or subcontractor; and

(vii) technical data listed or described in an agreement incorporated into the Schedule of this contract, which the parties have predetermined, on the basis of subparagraphs (i) thru (vi) above, and agreed will be furnished with unlimited rights.

(2) The Government shall have limited rights in:

(i) technical data, listed or described in an agreement incorporated into the Schedule of this contract, which the parties have agreed will be furnished with limited rights; and

(ii) technical data pertaining to items, components or processes developed at private expense, other than such data as may be included in the data referred to in (b)(1)(i), (iii), (iv), (v), and (vi);

provided that each piece of data to which limited rights are to be asserted pursuant to (2)(i) and (ii) above is marked with the following legend in which is inserted the number of the prime contract under which the technical data is to be delivered and the name of the Contractor or subcontractor by whom the technical data was generated:

Furnished under United States Government Contract No. ...,... Shall not be either released outside the Government, or used, duplicated, or disclosed in whole

or in part for manufacture or procurement, without the written permission of ....., except for: (i) emergency repair or overhaul work by or for the Government, where the item or process concerned is not otherwise reasonably available to enable timely performance of the work; or (ii) release to a foreign government, as the interests of the United States may require; *provided* that in either case the release, use, duplication or disclosure hereof shall be subject to the foregoing limitations. This legend shall be marked on any reproduction hereof in whole or in part.

No legend shall be marked on, nor shall any limitation on rights of use be asserted as to, any data which the Contractor has previously delivered to the Government without restriction. The limited rights provided for by this paragraph (b)(2) shall not impair the right of the Government to use similar or identical data acquired from other sources.

(c) *Material Covered by Copyright.*

(1) Notwithstanding the provisions of (b) above, the Contractor agrees to and does hereby grant to the Government, and to its officers, agents, and employees acting within the scope of their official duties, a royalty free, nonexclusive and irrevocable license throughout the world for Government purposes to publish, translate, reproduce, deliver, perform, dispose of, and to authorize others so to do, all technical data now or hereafter covered by copyright.

(2) No such copyrighted matter shall be included in technical data furnished hereunder without the written permission of the copyright owner for the Government to use such copyrighted matter in the manner described above.

(3) The Contractor shall report to the Government (or higher-tier Contractor) promptly and in reasonable written detail each notice or claim of copyright infringement re-

ceived by the Contractor with respect to any technical data delivered hereunder.

(*d*) *Removal of Unauthorized Markings.* Notwithstanding any provisions of this contract concerning inspection and acceptance, the Government may modify, remove, obliterate, or ignore any marking not authorized by the terms of this contract on any technical data furnished hereunder, if—

(i) the Contractor fails to respond within sixty (60) days to a written inquiry by the Government concerning the propriety of the use of the marking, or

(ii) the Contractor's response fails to substantiate his contention that the use of the marking is authorized, in which case the Government shall give written notice to the Contractor.

(e) *Relation to Patents.* Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government under any patent.

CONTRACT CLAUSES

(f) *Limitation on Charges for Data.* The Contractor reconizes that the Government, or a foreign government with funds derived through the Military Assistance Program or otherwise through the United States Government, may contract for property or services with respect to which the vendor may be liable to the Contractor for charges for the use of technical data on account of such a contract. The Contractor further recognizes that it is the policy of the Government not to pay in connection with its contracts, or to allow to be paid in connection with contracts made with funds derived through the Military Assistance Program or otherwise through the United States Government, charges for data which the Government has

a right to use and disclose to others, which is in the public domain, or which the Government has been given without restrictions upon its use and disclosure to others. This policy does not apply to reasonable reproduction, handling, mailing, and similar administrative costs incident to the furnishing of such data. In recognition of this policy, the Contractor agrees to participate in and make appropriate arrangements for the exclusion of such charges from such contracts, or for the refund of amounts received by the Contractor with respect to any such charges not so excluded.

(g) *Acquisition of Data from Subcontractors.*

(1) Whenever any technical data is to be obtained from a subcontractor under this contract, the Contractor shall use this same clause in the subcontract, without alteration, and no other clause shall be used to enlarge or diminish the Government's or the Contractor's rights in that subcontractor data which is required for the Government.

(2) Technical data required to be delivered by a subcontractor shall normally be delivered to the next higher-tier Contractor. However, when there is a requirement in the prime contract, or in the deferred order, for data which may be supplied with limited rights pursuant to (b)(2) above, a subcontractor may fulfill such requirement by submitting such data directly to the Government rather than through the prime Contractor.

(3) The Contractor and higher-tier subcontractors will not use their power to award subcontracts as economic leverage to acquire rights in data from their subcontractors for themselves.

(b) *Notice of Certain Limited Rights.* In accordance with 9-203(c), add the following paragraph (h) to the above Basic Data Clause.

(h) The Contractor will promptly notify the Contracting Officer in writing of the intended use of the performance

of the contract of any end-item, component, modification or process for which the Contractor intends to furnish data with limited rights; *provided,* that no such notice is required with respect to standard commercial items which are manufactured by more than one source of supply or with respect to data which the parties have specified in the Schedule would be furnished with limited rights. Subcontractors will notify the next higher-tier Contractor. (1965 FEB)

(c) *Technical Data Clause*—Specific Acquisition. In accordance with 9-203(d), insert the following clause.

RIGHTS IN TECHNICAL DATA—SPECIFIC ACQUISITION
(1964 MAY)

(a) *Definition. Technical Data* as used in this clause means technical writings, sound recordings, pictorial reproductions, drawings, or other graphic representations and works of a technical nature, whether or not copyrighted, which are specified to be delivered pursuant to this contract. The term does not include financial reports, cost analyses, and other information incidental to contract administration.

(b) *Government Rights.* The Government may duplicate, use and disclose in any manner and for any purpose whatsoever, and have others so do, all or any part of the technical data delivered by the Contractor to the Government under this contract.

APPENDIX C

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

INTERNATIONAL ENGINEERING COMPANY, DIVISION OF A-T-O INC., *Plaintiff,*

v.

ELLIOT L. RICHARDSON, ET AL., *Defendants.*

Civil Action No. 927-73

Findings of Fact and Conclusions of Law

PRELIMINARY STATEMENT

On May 10, 1973, International Engineering Company, a Division of A-T-O Inc. (Hereinafter IEC), instituted this action on its claim that the Defendant, Robert C. Seamans, Jr., the Secretary of the Air Force (hereinafter referred to as Defendant or the Air Force), had acted arbitrarily, capriciously, in violation of law and without rational foundation, under Regulations promulgated under the authority of Defendant, Elliot L. Richardson, Secretary of Defense (hereinafter referred to as Defendant Richardson or the Department of Defense), in the determination that the restrictive proprietary legend attached to IEC's final reports Nos. 70-06-04, 71-07 and 71-09 submitted to the Air Force under Contract No. F33657-69-C-1290 would be stricken therefrom and that these reports would be circulated outside the Government. In addition to its Verified Complaint, IEC filed Motions for a Temporary Restraining Order and a Preliminary Injunction, and a Memorandum in Support of Said Motions. By this Complaint IEC sought a declaratory judgment and an injunction restraining the Air Force against any further action to remove the restrictive legend from IEC's reports and a determination by this Court of IEC's proprietary claim to technical data contained in those reports. On May

10, 1973, the Office of the United States Attorney for the District of Columbia arranged with the Air Force to prevent the disclosure of Plaintiff's reports to the public pending a hearing on IEC's Motion for a Temporary Restraining Order. By a stipulation filed with this Court on May 15, 1973, Defendants agreed not to release any of IEC's reports pending a determination by this Court on IEC's Motion for a Preliminary Injunction. IEC's Complaint was verified by Elmer M. Lipsey, President of IEC, and signed by counsel and was submitted with Exhibits A through S attached.

On May 14, 1973, IEC filed a Notice To Take Depositions Upon the Oral Examination of W. C. Rustenburg and R. E. Harsfield on June 12, 1973.

On May 30, 1973, the Government filed a Motion to Dismiss or in the Alternative a Motion for Summary Judgment and Opposition to Motion for Preliminary Injunction, a Statement of Material Facts, Affidavits of Major Ronald Basso and Raphael E. Harsfield, Government Exhibits A through K, and a Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss or in the Alternative Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Preliminary Injunction. On June 4, 1973, the Government filed a Motion for a Protective Order to prevent IEC from taking the depositions of W. C. Rustenburg and Raphael E. Harsfield.

On June 11, 1973, IEC filed an Opposition to Defendants' Motion to Dismiss and Motion for Summary Judgment, an Opposition to Defendants' Motion for a Protective Order, a Statement of Genuine Issues pursuant to Rule 9(h) of the Rules of this Court, an Affidavit of James M. McHale, and a Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss, Motion for Summary Judgment and Motion for a Protective Order.

IEC's Motion for a Preliminary Injunction and the Government's Motion to Dismiss were set to be heard by

this Court on the morning of June 18, 1973. On June 14, 1973, the Government filed a "Reply to Plaintiff's Opposition to Defendants' Motion to Dismiss or in the Alternative for Summary Judgment." This was not received by IEC's counsel until the afternoon of June 18, 1973. A hearing was held in open court the morning of June 18, 1973. On June 20, 1973, IEC filed a "Supplemental Memorandum After Oral Argument in Opposition to Defendants' Motion to Dismiss and in Support of Plaintiff's Motion for a Preliminary Injunction." At the same time, IEC filed a proposed set of Findings of Fact and Conclusions of Law. Also, IEC filed Exhibit T which was entered into the record.

On July 10, 1973 this Court issued an Order and a Memorandum Opinion. By this Order it was directed first that the matter be remanded to the Contracting Officer for the purpose of obtaining from him a statement of reasons for his decision regarding the inadequacy of IEC's submissions. Second, this Order directed the parties to appear in open court on July 31, 1973 for the purpose of oral argument on two points: a) the legal properiety of the Contracting Officer's reasons for his decision to eradicate the restrictive legends here contested and b) the extent to which the opportunity to be heard is required by the Due Process Clause of the Fifth Amendment in the contractual procedure set forth in ASPR 7.104.9(a), Rights in Technical Data. Further, this Court ordered that the Defendants' Motion to Dismiss or in the Alternative for Summary Judgment be denied without prejudice to renew said motion for summary judgment. And finally, this Court ordered that Defendants' Motion for Protective Order be denied.

On July 11, 1973 Plaintiff renewed his notice to take the depositions of Messrs. W. C. Rustenburg and R. E. Harsfield on July 23, 1973. At the Government's request, their depositions were actually taken on July 24, 1973.

In accordance with the schedule established by this Court's July 10 Order, the Contracting Officer filed a Statement of Reasons for his 2 October 1972 Decision on July 20, 1973. Also in accordance with this Court's schedule established in its July 10, 1973 Order Plaintiff submitted a response to the Contracting Officer's Statement of Reasons on July 26, 1973.

A hearing was held in open court on July 31, 1973. This Court requested that parties submit further written material regarding the questions posed by its Order of July 10, 1973. In accordance with the schedule established at that hearing, Plaintiff submitted a Memorandum of Points and Authorities addressing these questions on August 8, 1973. Defendants responded with a Supplemental Memorandum in Opposition to Motion of Plaintiff for a Preliminary Injunction on August 13, 1973. On the basis of a detailed consideration of all of the submissions and arguments of all of the parties and the documentary exhibits, the Verified Complaint and the depositions of Messrs. Harsfield and Rustenburg, this Court makes the following Findings of Fact and Conclusions of Law in support of its Order entered this same day granting the Plaintiff's Motion for a Preliminary Injunction.

FINDINGS OF FACT

1. Plaintiff, International Engineering Co., a Division of A-T-O, Inc. (hereinafter IEC, is a corporation incorporated under the laws of the State of Ohio with its principal place of business in the State of Ohio. IEC has offices in Springfield, Virginia.

2. Defendant, Elliot L. Richardson, was the Secretary of Defense, with authority over activities of the Department of Defense including procurement matters and the promulgation of the Armed Service Procurement Regulations, and Defendant, Robert C. Seamans, Jr., was the Secretary, Department of the Air Force, with authority over activities

of the Department of the Air Force including procurement matters at the time this suit was filed. Presently James Schlesinger has succeeded Mr. Richardson and John McLucas was succeeded Mr. Seamans. The caption of this case is hereby ordered, pursuant to Rule 25(d) of the Federal Rules of Civil Procedure to be amended to acknowledge such substitution.

3. In late 1967, IEC conceived a system for guiding bombs or missiles with Loran C/D involving processes and certain components not developed with Government Funds (*see* Verified Complaint, Paragraph 5). The processes and the performance characteristics of the components were spelled out in detail in IEC Technical Proposal 101-68, dated February 3, 1968, which was submitted to the Air Force on February 8, 1968 with a restrictive legend.

4. At that time the Air Force considered IEC's report "proprietary" in that it described processes and components not developed at Government expense or generally available in the industry (*see* Rustenberg Deposition, Page 5).

5. In the one and one-half year period from January 1968 through June 1969, IEC incorporated its processes into certain components which existed as identifiable hardware prior to July 7, 1969 (*see* Verified Complaint, Paragraphs 10, 11, 13, 14 and 15, Independent Audit Report, Rustenberg Deposition, Page 5).

6. On July 7, 1969, IEC entered into a contract with the Air Force to modify its system for test in a helicopter and to perform certain laboratory and flight tests. That Contract provided that the modified hardware system would remain the sole property of IEC and that IEC would only deliver to the Air Force Integration Design Data and a Final Report (*see* Plaintiff's Exhibit D, Defendants' Exhibit D, DD Form 1423 attached to the original Contract). The only information required on the hardware to be used in the tests is set forth at Paragraph (b)4 of T-119 incor-

porated by reference into the DD 1423 Test Report requirement as follows:

> "(4) Description of test article, including test configuration identification and photographs as appropriate." (Defendants' Exhibit E.)

7. Also, in the two and one-half year period of January 1968 through June 30, 1970, IEC developed an advanced circuitry Loran C/D Navigation System.

That system was demonstrated for over 300 hours in an Aerocommander aircraft by IEC in that time period (*see* Verified Complaint, Paragraphs 24, 25, 26 and 28, Independent Audit Report) and generally proved to be effective (*see* Rustenburg Deposition, Pages 38-40).

8. By Modification P00003 to the Contract, the Air Force had IEC integrate these already existing components of IEC's Aerocommander Flight System into a Hybrid KMU353A/B Guided Bomb Simulation Test System (*see* Verified Complaint, Paragraph 30, Plaintiff's Exhibit G, Rustenburg Deposition, Page 40). Again, IEC retained its hardware, and only Test Reports were to be provided to the Air Force under the Contract.

9. In late 1969 efforts were made at the Aeronautical Systems Division, AFSC at Wright-Patterson Air Force Base to initiate competitive procurements based on IEC's processes and components. IEC protested to the Office of the Secretary of the Air Force on the basis of IEC's proprietary interests in these items. Mr. John Walsh, Deputy to the Assistant Secretary of the Air Force, R&D, convened a meeting at Wright-Patterson Air Force Base on January 19, 1970, which Mr. Rustenburg attended to discuss the impact of IEC's claims on competitive procurement. Subsequently, attempts at competitive procurement were abandoned (*see* Rustenburg Deposition, Page 19).

10. Mr. Rustenburg was clearly aware of IEC's claim to protection of its data pertaining to components developed

at private expense and subsequently integrated into the test system at the time he asked IEC to provide additional data in connection with the Loran Guided Bomb project. In a memorandum dated March 4, 1971, in which he commented on a competitive proposal that he rated very highly, Mr. Rustenburg said:

> "If it is decided that IEC's claims of proprietary data are invalid then it is proposed that the LSI proposal be funded." (Rustenburg Deposition, Exhibit 1.)

11. In late March 1971, Mr. Rustenburg asked IEC for a detailed description of the hardware used in the Helicopter and KMU353A/B Bomb Simulation Test Programs *including a detailed description of the internal operations in terms of mathematical equations and logic diagrams of IEC's precontract components.* (*See* Rustenburg Deposition, Page 29, Verified Complaint, Paragraph 34.) Mr. Rustenburg explained that this information would be helpful to the *Air Force* in evaluating the test results (*see* Rustenburg Deposition, Pages, 29, 34-36).

12. IEC considered this as an Air Force request for information for evaluation purposes only and while under no contractual duty to do so, provided the Air Force with Technical Report 71-05 which bore a restrictive legend appropriate for information voluntarily submitted to the Air Force. Because Mr. Rustenburg asked that this same information be incorporated into all Final Reports for the same reason, Report 70-06-04, which contained the same information in addition to KMU353A/B Bomb Simulation test results, was submitted with the same legend. (*See* Verified Complaint, Paragraphs 35 and 36.) The Air Force has never questioned the restrictive legend on Report 71-05. (*See* Rustenburg Deposition, Page 30.)

13. By letter of April 19, 1971, the Contracting Officer informed IEC that it had used the wrong form of restrictive legend on Report 70-06-4 in that

> "This final report is not a proposal but rather a requirement of the contract."

The Contracting Officer did not indicate that a restrictive legend was not authorized under the Contract; he simply referred IEC to ASPR 7-104.9(a) which sets forth the appropriate restrictive legends for Contract End Items (*see* Plaintiff's Exhibit H).

14. On May 28, 1971, near the end of the sixty (60) day period for correction of legends under ASPR 9-202.3(d)(3), the Contracting Officer reminded IEC of his April 17, 1971 letter and noted that:

> "At the date of this writing we have not received your reply and unless it is forthwith submitted, the legend will be removed and the contractor forfeits any rights of appeal."

15. IEC responded to the Contracting Officer's letters of April 19, 1971 and of May 28, 1971, on June 15, 1971, within the sixty (60) day period allowed by ASPR 9-202.3(d)(3). In that letter IEC explained that the IEC LOMISS Subsystem was included at the Government's request in the KMU353A/B Bomb Simulation Test System and that the subsystem "was developed and built at contractor expense, and has been made available for this effort on a nb charge loan basis." Further, IEC explained that the Contract requirements could have been met without inclusion of detailed information on this subsystem data, but that it was specifically requested by Air Force personnel to provide them with a more meaningful report. Finally, IEC recommended an amendment of the legend as set forth in Clause 21 of the Contract, but stated that if this was unacceptable to the Air Force "the detailed subsystem descriptions require appropriate revision." (*See* Plaintiff's Exhibit J.)

16. The Air Force did not respond to IEC's letter at all. The Air Force did not return the report to IEC for revision

even though the present Contracting Officer concedes that the report was the sole property of IEC at that time. (*See* Harsfield Deposition, Page 23.) Nor did the Air Force invoke its right to withhold partial payment from IEC under the Technical Data—Withholding of Payment (1966 October) Clause of the Contract.

17. The Air Force accepted IEC's correction of the legend and accepted IEC Report 70-06-4 with the Amended Legend on a DD Form 250 dated July 7, 1971. As a result of that acceptance IEC reasonably believed that the rights in data question had been resolved and similar treatment would be afforded future reports containing the same detailed information on the IEC privately-developed processes and components described in Report 70-06-4. (*See* Verified Complaint, Paragraph 45.)

18. After receiving IEC's Report No. 70-06-4 in April of 1971, Mr. Rustenburg accompanied the Contracting Officer to a meeting with the Legal Officer and showed him the report. At that time the Legal Officer concluded "that it [Report No. 70-06-4] was not 'proprietary' ". However, Mr. Rustenburg does not know on what the Legal Officer based his opinion. Nor did Mr. Rustenburg indicate the date of this meeting. (*See* Rustenburg Deposition, Pages 41 and 50.)

19. Mr. Rustenburg reviewed IEC's letter of June 15, 1971 at the Contracting Officer's request and provided written comments in a memo of July 1, 1971. (*See* Attachment 1 to Exhibit 1 to Harsfield Deposition.)

20. In a subsequent verbal contact between Mr. Rustenburg and the Contracting Officer, it was decided that the Rights in Data matter be dropped since in Report 70-06-4:

> ". . . the issuance of P00006 directing a continuation of the effort initiated under P00003 constituted a tacit acceptance by the Government." (Exhibit 1 to Harsfield Deposition.)

21. On October 15, 1971, IEC submitted Report 71-07 to the Air Force; this report described the results of testing under the original Contract. It contained, at the Air Force's request, the same detailed information on the internal operations of IEC developed components as was submitted in Reports 71-07 and 70-06-4. Accordingly, IEC officials had no reason to doubt that a restrictive legend limiting the use of the report to internal Government purposes would be acceptable. Again, the Government described the need for the data for Air Force evaluation purposes and not for disclosure to its competitors. Again, Mr. Rustenburg reviewed the report as technical advisor to the new Contracting Officer, Mr. Harsfield (*see* Rustenburg Deposition, Page 41). No objection was raised to the restrictive legend and the report was accepted as submitted.

22. On December 10, 1971, IEC submitted Final Report 71-09 on the original Contract and all modifications. That report contained all of the information in Report 70-06-4 including the same detailed description of the internal operations of the IEC developed processes and components. (*See* Verified Complaint, Paragraph 49.) This report was marked with a restrictive use legend on the data pertaining to the detailed description of those components that IEC developed entirely at its own expense.

23. After the Contract was transferred from ASD to ESD, a buyer reviewed the Contract file and advised the new Contracting Officer, Mr. Harsfield, that:

> "... there had been some problem about the prior contracting officer and the affixing of the proprietary data on other documents within the contract."

The Contracting Officer doesn't know whether this was before or after submission of Report 71-09 (*see* Harsfield Deposition, Page 5). The Contracting Officer indicates that the buyer probably received some information on this subject from Mr. Rustenburg (*see* Harsfield Deposition, Page

6). Beyond these facts Mr. Harsfield disclaims any personal knowledge of the circumstances surrounding his letter of December 28, 1971, in which he questioned the restrictive legend on Report 71-09. However, he does recall receiving a letter or report that backs up his letter (*see* Harsfield Deposition, Page 7). At the depositions taken on July 24, 1973, Defendants promised to provide Plaintiff with this letter (*see* Harsfield Deposition, Pages 84-85). This letter has not yet been filed with this Court.

24. The letter of December 28, 1971 (*see* Plaintiff's Exhibit K) referred again to ASPR 7-104.9 which contains the limited rights legend for contract end items. The letter contained no statement that "Limited Rights" protection would not be appropriate and no Findings of Fact or Conclusions of Law were offered. Recommendations were made that IEC remove proprietary markings or furnish substantiation to the contrary and a reply was requested by January 5, 1972.

25. IEC replied by letter of January 5, 1972 (*see* Plaintiff's Exhibit L). In that reply IEC reconstructed the precontract events and developments and the prior history of the rights in data question as explained in their earlier correspondence with the prior Contracting Officer, Mr. Hathaway. IEC pointed to the acceptance of Reports 70-06-4 and 71-07 with restrictive legends after the rights in data issue had surfaced as the basis for their belief that the matter had been resolved. Finally, IEC stated that if the placement of the legend on the data was not acceptable to the Air Force, IEC wanted the Reports back so it could make appropriate revisions to the detailed subsystem descriptions.

26. The Air Force did not return IEC's Reports; nor did the Air Force exercise its rights under the Technical Data —Withholding of Payments Clause. During the five month period between January and June, 1972, Mr. Harsfield's only action to resolve the matter was to request a one (1)

page report from Mr. Rustenburg (*see* Harsfield Deposition, Page 17 and Exhibit 1).

27. Also a DD 250 accepting Report 71-09 was prepared by Mr. Rustenburg, but it was not mailed to IEC. (*See* Harsfield Deposition, pages 22-25.)

28. The Air Force replied to IEC's January 5, 1972 letter by a letter signed by Mr. Harsfield and dated June 5, 1972. (*See* Plaintiff's Exhibit M.) This letter does not respond to any of the factual allegations made by IEC five months earlier. It does not make any finding as to whether a restrictive legend is authorized by the Contract. This letter concludes that IEC's January 5, 1972 response to the Contracting Officer's letter of December 28, 1971 "fails to justify the use of this legend or show that any restriction is authorized." The Contracting Officer then without any prior notice to IEC, directed the obliteration of the legend on Reports 71-09 and 70-06-4 on the grounds that:

> ". . . no response satisfactorily justifying use of this or any other restrictive legend has been received from the Contractor."

Again, no findings were made as to whether a restrictive legend was authorized under the Contract. Finally Mr. Harsfield, informed the Contractor that he had "authorized data in the above-mentioned reports to be used with unlimited rights."

29. As soon as the Contracting Officer's letter of June 5, 1972 was received at IEC, counsel was immediately consulted and a telephone appeal was made to the Secretary of the Air Force, followed on June 9, 1972 by TWXs to ESD and the Office of the Secretary requesting continued limited rights protection under ASPR 9-202.3(d). (*See* Plaintiff's Exhibit N.) It was agreed that the matter would be further discussed with ESD and that the final decision would be made in the Office of the Secretary of the Air

Force. A meeting was set up at ESD "to discuss the proprietary rights question," and the reports were afforded limited rights protection until further notice (*See* Plaintiff's Exhibit 0).

30. On June 26, 1972 a two-hour meeting was held at ESD. Mr. Harsfield made a brief introduction in which he stated that the purpose of the meeting was simply to discuss the problem and that no decision would be reached by ESD, but that ESD would merely provide their comments to the Secretary of the Air Force through Command channels (*see* Harsfield Deposition, Exhibit 2).

31. Mr. Lipsey, IEC's president, provided the attendees with an outline of an oral presentation (*see,* Attachment 1 to Harsfield Affidavit dated May 16, 1973). Mr. Lipsey's nearly two-hour oral presentation was made in the form of a historical narrative of IEC's development of the processes and components in question and the events that subsequently occurred under the Contract. References were made to items in the Air Force's contract file and IEC made a request for a Defense Contract Audit Agency audit of all its books and records to establish the funding of development of specific components. IEC also requested the return of its reports for limited rights legend. In substance all of the material set forth in IEC counsel's letter of February 8, 1973 was presented at the June 26, 1972 meeting. (*See* Plaintiff's Exhibit S, Page 1 and Harsfield Deposition, Page 84.) Even though Mr. Harsfield had been furnished information from his technical advisors that contract funds were used to complete the development of the units involved, he did not confront IEC with these allegations and he did not ask IEC for any specific or detailed information in connection with any specific allegation raised by his legal or technical advisors. (*See* Harsfield Deposition, Pages 76-77.) Not only did Mr. Harsfield decline to question or comment on IEC's presentation, but his Technical Advisor also remained silent upon the advice of Mr. Tracey, the ESD counsel. Thus the basis for the

Air Force's claim to IEC's data was not disclosed to IEC. (*See* Rustenburg Deposition, Pages 55-56.)

32. At the close of IEC's presentation, Mr. Harsfield made some closing remarks in which he asked Mr. Lipsey to provide an indication of what material on each page was "proprietary" and a written narrative history of the development of the processes and components alleged to have been developed at IEC expense so that it could be forwarded to higher headquarters. (*See* Exhibit 2 to Harsfield Deposition.)

33. By letter of June 30, 1972 that Mr. Lipsey carried to Hanscom Field, Mr. Lipsey submitted more specifically marked copies of the Reports in question on July 4, 1972. He then stated that he would attempt to provide a written narrative of the development information provided at the meeting by July 17, 1972. (*See* Verified Complaint, paragraph 59.)

34. On July 13, 1972, the Contracting Officer agreed to treat the Reports with limited rights "until an ultimate decision is rendered as to whether data under question is in fact 'Limited' or 'unlimited.'" (*See* Defendants' Exhibit I.)

35. Before any decision on the merits of the Rights in Data question either at ESD, AFSC, Headquarters USFA, or the Secretary of the Air Force, or complying with IEC's request for return of its Reports, Mr. Rustenburg executed and Mr. Harsfield forwarded to IEC a DD 250 final acceptance on the Contract. Final payment followed quickly and was accomplished by the Air Force at the end of September 1972. (*See* Plaintiff's Exhibit T, Items 2 and 3.)

36. Immediately after final payment was made and the Contract was closed-out, the Contracting Officer issued his letter of October 5, 1972 (*see* Defendants' Exhibit J) withdrawing his letter of July 13, 1972 and again directing unlimited use of the Reports in question. Mr. Harsfield made no finding as to whether the data should be "limited" or

"unlimited" under the terms of the Contract and no review of his decision was undertaken at AFSC, Headquarters USAF or the Office of the Secretary of the Air Force before it was issued (*see* Harsfield Deposition, Page 55.)

37. Before release of Reports by the Defense Documentation Center (DDC), telegrams were dispatched to the Director of DDC and the Office of the Secretary of the Air Force protesting release of the Reports prior to a decision on the merits of the Rights in Data question at the Secretary of the Air Force level. On December 27, 1972, Mr. Sowder, Director of Technical Services, DDC, confirmed to IEC counsel that the Reports had not and would not be released pending a decision on the merits of the Rights in Data question. (*See* Exhibit 2 attached to Plaintiff's Memorandum of August 8, 1973.)

38. Mr. Rustenburg and Mr. Tracey, ESD counsel, came to Washington, D.C. in early January 1973, to make a presentation to Headquarters AFSC on their actions in this matter. The Contracting Officer, Mr. Harsfield, did not attend that presentation. Mr. Prahinski, AFSC counsel, and Major Basso and others heard the presentation. That same afternoon Air Force officials from the Pentagon came over to AFSC and the same presentation was made. However, Mr. Reichart, the cognizant Assistant General Counsel of the Air Force, was not present and Mr. Rustenburg cannot identify any of the Pentagon attendees. No decision was reached at that meeting. (*See* Rustenburg Deposition, Pages 59-60.)

39. Apparently as a result of the morning meeting, Headquarters AFSC concluded that the ESD action was proper and recommended that the Chief of Staff send IEC a telegram to the effect that AFSC and Headquarters USAF had reviewed the ESD action and found it proper and that as a result no meetings planned with the Office of the Secretary would be warranted and that the DDC "hold" on the reports should be released. (*See* AFSC TWX, Exhibit 3, to Harsfield Deposition.) That TWX also requested

permission to immediately order DDC to release the Reports in question.

40. Apparently, Headquarters USAF disagreed with AFSC since no telegram was sent and the meetings at the Secretary of the Air Force level were held. Further, DDC did not release the Reports but instead returned them to ESD (*see* Rustenburg Deposition, pages 61-68).

41. IEC's counsel met with Mr. Reichart, Counsel to the Secretary of the Air Force in late January 1973. Representatives of Headquarters USAF and AFSC were present. At Mr. Reichart's request, counsel for IEC prepared the written narrative and position paper dated February 8, 1973 (*see* Plaintiff's Exhibit S) for Mr. Reichart's review and consideration.

42. On March 16, 1973, the Chief of Staff of the Air Force responded to AFSC's January TWX. (See Harsfield Deposition, Exhibit 4.) By that TWX, AFSC was authorized "to make final decision with respect to . . . [IEC's] claim to proprietary rights under LOMISS Contract."

However the Chief of Staff directed that

> "As recommended by SAF/GC, consideration will be given to information contained in IEC letter to SAF/GC, same subject dated 8 February 1973."

43. Apparently, AFSC redelegated the matter back to ESD and the Contracting Officer to review his own actions and make a final decision on the merits of IEC's claim to limited rights protection under the Contract. (*See* Rustenburg Deposition, Pages 62-64.) Mr. Harsfield did not review the matter and did not read the February 8, 1973 letter before the filing of this litigation. (See Harsfield Deposition, Pages 118-119.) Mr. Rustenburg, however, read the February 8 letter. He spent perhaps 15 minutes glancing at the 50-page letter and concluded only

that it contained no technical information. (*See* Rustenburg Deposition, Pages 63-65.)

44. The Reports have been returned from DDC and are in Mr. Rustenburg's custody and have not been released outside the Government. (*See* Rustenburg Deposition, Page 61.)

45. The same data is marked as restricted in all reports. That data pertains to the internal functioning of the components developed by IEC outside the Contract and later incorporated into the Contract test systems on a loan basis. Release of this information, mathematical equations and logic diagrams, would enable another competent manufacturer to make a component to perform the same function (*see* Rustenberg Deposition, Pages 90-93).

46. Mr. Rustenburg believes and always has believed that the word "function" as used in the terms "form, fit and function" in ASPR 9-203(b)-(b)(1)(iv) relates not only to the input and output of a component but relates to the internal operation as well. All of his advice to the Contracting Officer at ESD, AFSC and Headquarters USAF was based on that belief. (*See* Rustenburg Deposition, page 94.)

47. Nevertheless, with the internal equations and logic diagrams, reproduction of a similar component would be simple and thus release of this information would eradicate IEC's competitive advantage in this field. (*See* Rustenburg Deposition, Page 95.)

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter of this action. 28 U.S.C. §§ 1331, 1361, 2201 and 2202. 5 U.S.C. § 702.

2. The Administrative Procedure Act provides a basis for subject matter jurisdiction in this suit and thus sovereign immunity is waived. *See Scanwell Laboratories,*

Inc. v. *Shaffer,* 137 U.S. App. D.C. 371, 424 F.2d 859 (1970).

3. The Contracting Officer's decisions of June 5, 1972 and October 2, 1972 directing the obliteration of certain restrictive legends and authorizing that IEC's data be used with unlimited rights were erroneous as a matter of law and were violative of plaintiff's procedural due process rights under the ASPR 7-104.9(d). The Air Force never ordered data pertaining to the internal operations of any of the components of either of these systems tested under the Contract and therefore never acquired any rights in the data marked by a restrictive legend. (*See* Mil-Std-831 and Data Item Description T-119 incorporated by reference into DD1423 attached to Air Force Contract F33657-69-C-1290 and made a part thereof.)

4. The Air Force is estopped to deny IEC's rights in data position since IEC relied on the Air Force's informed acquiescence to IEC's position on Report 70-06-04 when the Air Force denied IEC the opportunity to revise that report so as to delete the data on which it placed the restrictive rights legend. The Air Force subsequently denied IEC's request to perform a similar revision on Reports 71-07 and 71-09. *See United States* v. *Georgia Pacific Company,* 421 F.2d 92 at 96 (9th Cir. 1970); *Manloading and Management Associates* v. *U.S.,* 198 Ct. Cl. 628, 461 F.2d 1299 (1972); *Branch Banking and Trust Company* v. *United States,* 120 Ct. Cl. 72, 98 F. Supp. 757 (1951), *cert. denied,* 342 U.S. 893 (1951); *Covington Industries, Inc.,* ASBCA No. 12426, 68-2 BCA ¶ 7286; and 28 Am. Jur. 2d, Estoppel and Waiver, § 28.

5. ASPR requires that the data IEC marked with a restrictive legend pertaining to the internal operation of components and processes developed at IEC's expense be afforded "limited rights" protection. The Air Force cannot claim any rights in IEC's data under ASPR 7-104.9 (b)(1)(iv) which refers to "form, fit and function data."

> " 'Form, fit and function' data [is] data used in identifying various characteristics of an item, but ordinarily not disclosing manufacturing information."

See "The Department of Defense's Dissemination to the General Public of Data Acquired Under "Contract," a speech given by Lawrence Glassman, Chief Opinions Branch, Patent Law Division, Office of the General Counsel, U.S. Army Material Command, Washington, D.C., to the Washington, D.C. Chapter of the National Contract Management Association on April 19, 1972. (A copy of this was attached to Plaintiff's August 8, 1973 memorandum as Exhibit 5).

6. Because of the violations of law in this case there was no valid legal basis for the Air Force's determination to strike the restrictive legend from IEC's data.

7. Inasmuch as the Air Force's determination to strike the restrictive legend from IEC's data was based on an invalid action by the Defendants, there is a very strong likelihood of success by IEC in its claim to "limited rights" protection for the data in dispute herein.

8. IEC has no adequate remedy at law to protect itself from the devastating effect of the threatened disclosure of the data pertaining to the processes and components developed at IEC's expense and included in reports 71-05, 70-06-04, 71-07 and 71-09 at the Air Force's request. Protection of trade secrets has traditionally provided a basis for injunctive relief. (*See* Milgram, Trade Secrets, § 1.09). This concept of irreparable injury arising out of mere disclosure of a trade secret has been specifically incorporated into ASPR. *See* ASPR § 9-201.1(b). Moreover, the Comptroller General has consistently applied a form of injunctive relief to cases within his jurisdiction by directing the cancellation of solicitations which will result in unauthorized disclosure of information submitted under a restrictive legend. *Gayston Corp.,* Comp. Gen. Dec. B-143711 (Dec.

22, 1960) (unpublished); *Aircraftsmen, Inc.*, 41 Comp. Gen., 148 (1961); *Bausch Associates, Inc.*, Comp. Gen. 346 (1963); see generally, Patents and Technical Data, George Washington University, Government Contracts Monograph No. 10, pages 174-178 (1967). Most importantly, a suit in the Court of Claims for money damages is not an adequate remedy for the injury caused by disclosure of a trade secret. In addition, the Court of Claims has never awarded money damages on the basis of a mere unauthorized disclosure of "proprietary data." The conclusion that *no* remedy, not even an inadequate remedy exists at law for the specific injury threatened here is supported by the conclusion of a Government Commission benefitting from two years of extensive research. (*See* Report of the Commission on Government Procurement, Vol. 4, page 131.)

9. IEC will suffer irreparable injury if the restrictive rights legend is stricken from its data and its data disseminated to the public through the Defense Documentation Center. The property right in a trade secret, such as IEC claims in the technical data herein, disappears upon disclosure. *See* Milgrim, Trade Secrets, § 1.09.

10. It is most unlikely that any interested party will suffer substantial harm as a result of this Court's enjoining Defendants from disclosing the technical data to which IEC has attached a restrictive rights legend. IEC's data has value for Defendants only to the extent that it can be used for the evaluation of future development and procurement of bomb systems. This purpose can be served under the "limited rights" protection requested by IEC since internal Government use is clearly allowed. If subsequently it becomes necessary to obtain this information and provide it to other contractors, IEC's offer to negotiate a sale of this data under ASPR 9-202.2(f) provides adequate protection to the Defendants.

11. Restraining Defendants from disclosing IEC's technical data to which IEC has attached a restrictive rights

legend is in the public interest. This Court has concluded that the disclosure of IEC's technical data to which it has attached a propriety legend would be invalid and illegal. Clearly the effect of such a disclosure on the wider procurement community engaged in providing goods and services to the Government would be devastating. Indeed, ASPR 9-202.1(c) recognizes the contractor's interest in protecting his data. Thus if IEC's technical data could be disclosed without regard to IEC's due process rights, all other Government contractors would be put on notice that they can be likewise wronged if they make an attempt to cooperate with Government officials by providing them with useful information to which they claim a limited rights interest. (*See* Report of the Commission on Government Procurement, Vol. 4, Chapter 3 (1972)).

12. According full and proper weight to all pertinent factors and considerations, including the decisions of the Court of Appeals in *inter alia, Virginia Petroleum Jobbers Association* v. *FPC*, 104 U.S.App. D.C. 106, 259 F.2d 921, 925 (1958), *Wheelabrator Corp.* v. *Chaffee*, 455 F.2d 1306 (D.C. Cir. 1971), *M. Steinthal and Co., Inc.* v. *Seamans*, 455 F.2d 1829 (D.C. Cir. 1971), *Scanwell Laboratories, Inc. Shaffer*, 137 U.S. App. D.C. 371, 424 F.2d 859 (1970), and more recently *Murray* v. *Kunzig*, 462 F.2d 871 (D.C. Cir. 1972) and *Horne Bros., Inc.* v. *Laird*, 462 F.2d 1268 (D.C. 1972), this Court has concluded that a preliminary injunction should be issued directing defendants not to strike the limited rights legend from IEC's Reports Nos. 70-06-04, 71-07, 71-09, until this Court has had the opportunity to render a decision on the merits of IEC's Complaint for a Declaratory Judgment.

/s/ CHARLES R. RICHEY
Charles R. Richey
United States District Judge

Dated: October 23, 1973

APPENDIX D

UNITED STATES DISTRICT COURT,
DISTRICT OF COLUMBIA

INTERNATIONAL ENGINEERING COMPANY, *Plaintiff*,

v.

ELLIOT L. RICHARDSON, ET AL., *Defendants*.

Civ. A. No. 927-73.
July 10, 1973.

Memorandum Opinion

CHARLES R. RICHEY, District Judge.

INTRODUCTION

This action arose out of a Complaint for a Declaratory Judgment and Injunctive Relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 and 28 U.S.C. § 1331 and the Administrative Procedure Act (5 U.S.C. § 702) by Plaintiff, International Engineering Company (hereinafter IEC or Plaintiff) against Defendants, Elliot Richardson, Secretary of Defense and Robert Seamans, Jr., Secretary of the Air Force (hereinafter Government or Defendants). Plaintiff seeks equitable relief to restrain Defendants from releasing to the Defense Documentation Center three Final Technical Reports delivered by Plaintiff to the Air Force in connection with Government Contract F33657-69-C-1290 (hereinafter referred to as Contract). Plaintiff delivered the Reports with Restrictive Legends affixed that purported to limit the Government's use of the research data contained therein to circulation among Government Agencies only. Plaintiff alleges that it has a "proprietary" interest in portions of the Reports and that the Contracting Officer's decision to the contrary reflected an unconstitutional application of the Armed Services Procurement Regula-

tions by depriving IEC of the due process to which it was entitled. Alternatively, Plaintiff argues that if the Armed Services Procurement Regulations permit the Contracting Officer to remove IEC's "proprietary" legend without requiring a hearing, such regulations violate the due process clause of the Fifth Amendment. The Air Force contends that Plaintiff was afforded adequate due process consistent with Armed Forces Regulation (ASPR) § 7-104.9(a), Rights in Technical Data, incorporated by reference into the Contract. Defendant urges that the technical data in issue is part of the very material for which the Government contracted and paid, and that the Government has every right to distribute it to other Defense Department contractors.

Plaintiff seeks a Preliminary Injunction and Defendants seek to have the Court dismiss the suit, or enter Summary Judgment in their favor. Plaintiff additionally wants to depose two Air Force officials but agrees to delay the depositions pending resolution of Defendant's Motion to Dismiss.

Before turning to the questions presented, several facts should be mentioned. On February 8, 1968, IEC submitted a technical proposal to the Air Force reflecting IEC's development to date of a process for guiding bombs or missiles with a Loran C/D system (hereinafter LOMISS). As a result of the proposal, the Air Force entered into a contract with IEC effective May 29, 1969 to provide final and interim reports of a flight test evalution of the LOMISS system. From a data certificate executed by the parties March 3, 1969 and not included in the express terms of the Contract, it appears that IEC agreed to furnish with unlimited rights to the Government the information required to comply with the initial data requirements of the Contract. The Contract included at Part V a clause entitled "Data Provisions" which purported to delineate the rights of the parties in data under the Contract to the exclusion of any documents not expressly provided for in the Contract. The most important Contract provision relating to the respective rights in data was ASPR § 7-104.9(d), incorporated by reference

into the Contract, with the pertinent provisions set forth as follows:

> "(d) *Unmarked or Improperly Marked Technical Data*
>
> (1) Technical data received without a restrictive legend shall be deemed to have been furnished with unlimited rights. However, the contracting officer may permit the contractor to place a restrictive legend on such data within six months of its delivery if the contractor demonstrates that the omission of the legend was inadvertent and the use of the legend is authorized.
>
> (2) Technical data received with a restrictive legend not permitted by the terms of the contract shall be used with limited rights pending inquiry to the contractor whose name appears on the data as the originator. If no response to a properly directed inquiry has been received within 60 days, or if the response fails to show that the restriction was authorized, the cognizant Government personnel shall obliterate such legend, notify the contractor accordingly, and thereafter may use such data as if it were acquired with unlimited rights."

The above Rights in Technical Data clause also provides that IEC would have a property interest in and that Air Force would have only limited rights to the following:

> ". . . technical data pertaining to items, components, or processes developed at private expense." ASPR 7-104.9 (a).

Under the "Limited Rights" provision, the Government is entitled to circulate technical data generated at IEC's expense among Government personnel but not among Government contractors in competition with IEC.

This Contract was modified twice in 1970 and 1971 to involve testing of more recently developed IEC processes and components. At the time the Final Report under the

first contract modification was to be filed, the Air Force Project Engineer requested IEC to provide information on processes and components to facilitate the Air Force's evaluation of the results of the simulation test program. IEC responded by providing such information in the Final Report but affixed to it a "Proprietary Notice" indicating IEC developed this data at private expense. On two other occasions IEC submitted Final Reports containing what IEC considered extra-contractual information on processes and components. Accordingly, restrictive legends indicating a proprietary interest were marked on the material. After submission of the first report and, again, after the later reports were given to the Government, the Contracting Officer notified IEC by letter that the Air Force had "unlimited rights" to the Final Reports necessitating the removal of the restrictive legends unless IEC furnished substantiation of its "proprietary notice." On June 26, 1972 the Contracting Officer met with IEC representatives to provide them with the opportunity to substantiate the "limited rights" legends contained in the three Final Reports. At the conclusion of the meeting, the Contracting Officer stated that IEC still had failed to substantiate its claim and that further material should be submitted. IEC failed to submit more information by July 17, 1972, as promised. On October 2, 1972, the Contracting Officer informed IEC that the Government would treat the data with "unlimited rights." By agreement, the Government will treat the data in question with "limited rights" pending a decision by the Court on Plaintiff's Motion for a Preliminary Injunction.

Questions Presented

1. Whether the Court lacks jurisdiction over the subject matter of this suit?, and

2. Whether the Contracting Officer's failure to state reasons for his decision to eradicate IEC's restrictive legends frustrates effective judicial review?

Conclusions

1. *The Applicability of the Administrative Procedure Act Serves as a Waiver of Sovereign Immunity.*

As a threshold matter in this case, the Court is confronted with questions of sovereign immunity and preclusion of judicial review in relation to the actions of a Contracting Officer under a Government Contract. Plaintiff seeks review of the Contracting Officer's determination of Plaintiff's rights in technical data pursuant to ASPR 7-104.9(a), under section 10 of the Administrative Procedure Act, 5 U.S.C. § 702 (Supp. IV 1965-68), which provides:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

Plaintiff asserts that the action of the Contracting Officer in deciding to strike IEC's restrictive legends from the Final Reports prepared by IEC under the Contract and disclose those reports to the public through the Defense Documentation Center was arbitrary and capricious, without authority and without due process of law insofar as Plaintiff was not given adequate notice or proper hearing before its property was appropriate.[1] Plaintiff additionally

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[1] Although the Court is not at this time deciding Plaintiff's contention that a formal administrative hearing is required in this case, it is important for the Court to outline some thoughts on this legal issue, while reserving the opportunity to make a final decision on the basis of supplementary submissions and oral argument. Beginning with the general constitutional norm that government may not act against an individual before granting him a hearing, the Court believes that in a manner consistent with the ASPR 37-104.9(d) procedure agreed to by the parties, notice and an opportunity to be heard were dutifully provided. Therefore, the Court's focus is on the nature of that opportunity to be heard. An immediate issue which arises is whether the informal procedure administered by the Contracting Officer resulted in a decision based

pleads that the Contracting Officer acted without due process of law in issuing his decision without indication as to what factors he considered relevant, what weight be attached to those factors, or how he arrived at his conclusion.

In support of jurisdiction under the APA, Plaintiff has shown that it is "aggrieved" by the Contracting Officer's acts within the meaning of a relevant statute, the Armed Services Procurement Act, 10 U.S.C. chapter 137, and the Armed Services Procurement Regulations (ASPR) promulgated thereunder, specifically ASPR 9-203(a)-(d) which has the force of law in this Contract.[2] Therefore it is the

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upon incomplete information, untested by the adversary process. A second question is whether an adversary hearing as a functional matter offers a better method for resolving the instant factual dispute than the informal conference held June 26, 1972 with all interested parties in attendance. Finally, the Court is concerned whether the requirement of a formal hearing where a contractor's restrictive legends are challenged by a contracting officer is inappropriate to the contractual nature of the dispute and creates an unnecessary impediment to the workings of the Government's procurement operation. The United States Court of Claims has indicated that where a hearing is not required in the Contracting Officer's resolution of a contract dispute and his decision is appealable to the Armed Services Board of Contract Appeals, a contractor's allegation that the Contracting Officer acted unconstitutionally in assigning the contractor an undeterminable burden of proof simply will not stand. Plaintiff in *Newport News, infra, footnote 2,* like the contractor here, argued that it was impossible to inveigh against the Contracting Officer's decision when the substance of that decision was unknown.

[2] The Armed Services Procurement Regulations called to the Court's attention provide a procedure whereunder the Contracting Officer determined contested rights in technical data. Defendant has not directed the Court to any provisions of the Armed Services Procurement Act, *supra,* or the Administrative Procedure Act, *supra,* which suggest that an ASPR once incorporated as a contract clause parts with all identity as a federal regulation governing certain acts of Contracting Officers. Several cases suggest that the ASPR is law governing "the award and interpretation of contracts as fully as if it were made a part thereof." Chris Berg, Inc. v.

Court's conclusion that the provisions of section 10 are applicable. In such a situation section 10 of the APA serves as a waiver of sovereign immunity. Scanwell Laboratories v. Shaffer, 137 U.S.App.D.C. 371, 424 F.2d 859 (1970); Estrada v. Ahrens, 296 F.2d 690 (5th Cir. 1961).

The Government urges that *Scanwell* is inapposite to the case at bar since Plaintiffs in *Scanwell* were contractors who lost contract awards because of alleged arbitrary Government conduct under regulations designed to control the contract letting process. However, the Court discerns nothing in Defendants' argument to support the proposition that a Government official's conduct under federal regulations incorporated by reference into a Government Contract is not reviewable under the APA. Nothing in the APA or cases with which the Court is familiar support Defendants' contention. Although the case is not directly on point, the Court in *Scanwell* does identify the primary concerns a reviewing court should have in deciding questions of jurisdiction. The Court there looked to the injury to Plaintiff's economic livelihood and the public's interest in preventing the granting of contracts through arbitrary or capricious action. Here, Plaintiff alleges prospective loss of a complex system for guiding missiles developed by Plaintiff over several years at great expense. Additionally, the public's interest is apparent in preventing arbitrary or capricious action by Government officials in distributing

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United States, 426 F.2d 314, 317, 192 Ct.Cl. 176 (1970); G. L. Christian & Assoc. v. United States, 312 F.2d 418, 160 Ct.Cl. 1, reh. denied, 320 F.2d 345, 160 Ct.Cl. 58, cert. denied, 375 U.S. 954, 84 S.Ct. 441, 11 L.Ed.2d 314 (1963). In addition, it appears that the ASPR is binding on Government officials. Newport News Shipbuilding & Dry Dock Co. v. United States, 374 F.2d 516, 179 Ct.Cl. 97 (1967). Furthermore, the Court believes that the Rights in Technical Data Clause discussed in the text of this Opinion is intended to protect the property interests of contractors like Plaintiff and can be invoked by them against an administrative determination contrary to the regulation's terms. Cf. Fletcher v. United States, 392 F.2d 266, 183 Ct.Cl. 1 (1968).

the proprietary data of contractors submitted to the Government for national security programs. Thus, the alleged threat of legal wrong to Plaintiff's interests are sufficient to warrant some means of judicial redress.

In exercising jurisdiction over Plaintiff's claim, the Court provides the "aggrieved" contractor with the only forum in which it can obtain the relief sought and thereby prevent irreparable damage to its competitive position. Neither the Armed Services Board of Contract Appeals nor the Court of Claims has jurisdiction to grant Plaintiff the injunctive relief sought in the present case. For example, the Armed Services Board of Contract Appeals is authorized to grant relief in the form of an equitable adjustment under a substantive provision of the contract such as the "disputes" article clause in interaction with the "changes" articles in the contract at bar. See *The Breed Corp.*, ASBCA Nos. 14074 and 14344. In *Breed,* the Government argued that the Board lacked jurisdiction to grant the relief in the nature of an injunction as requested by appellant. Indeed, the Government advised the Board that only the United States District Court could provide injunctive relief against the Government. The Board agreed that the relief requested was beyond the delegation of the Board's "Charter" and denied appellant's motion to stay the Contracting Officer's actions in that case. Now the Government chooses to come before the Court and argue that this forum is not authorized to issue the relief sought. Thus the Government placed Plaintiff in a "Catch 22" predicament plainly contrary to the interests of justice. Consequently this Court holds that jurisdiction indeed exists in the instant matter.

It should be noted that the Court of Claims is not expressly authorized by Congress to grant the kind of relief sought here. United States v. King, 395 U.S. 1, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969). Other avenues of review are also blocked; Plaintiff sought administrative relief from the Secretary of the Air Force's Deputy Counsel and from

the Comptroller General, both of whom denied the availability of review, the latter because IEC's claim for relief was not made in connection with a procurement.

Therefore, for the reasons stated above, the Court concludes that it has jurisdiction over the parties and the subject matter of this action. 28 U.S.C. §§ 1331, 1361, 2201 and 2202, and 5 U.S.C. § 702.

2. *The Contracting Officer's Failure to Elucidate the Basis for His Decision Prevents the Court's Expeditious Review of the Record.*

The record reflects the Contracting Officer's opinion that IEC made a full and complete presentation in an attempt to substantiate its claim that the Government has only "limited rights" to certain material contained in the three Final Reports at issue. However, his response to IEC's presentation at the June 26, 1972 meeting with all interested parties present was that IEC had not "furnished the substantiation required for a determination that the Government was entitled to only 'Limited Rights' to the data in question." (Affidavit of Raphael Harsfield, May 16, 1973). Further submissions by Plaintiff were also determined by the Contracting Officer to contain no substantiation to justify IEC's claim. In his responses, the Contracting Officer has offered conclusions unsupported by a statement of the determinative reasons. See Camp v. Pitts, 411 U.S. 138, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973). In light of the extensive technical material before the Court which documents the correspondence between IEC and the Contracting Officer, the Court finds the Contracting Officer's brief conclusion inadequate for effective review of the Contract materials at issue and the Armed Services Procurement Regulations which bear on those materials.

In an area as complex as Government procurement, the Court needs the benefit of the Contracting Officer's underlying reasoning in order to expeditiously review the record. To allow brief indications of reasons for what constitutes

final agency action is to impede the Court's participation in the " 'partnership' in furtherance of the public interest" that court and agency must share. Greater Boston Television v. FCC, 143 U.S.App.D.C. 383, 444 F.2d 841, 851-852, cert. denied, 403 U.S. 923, 91 S. Ct. 2233, 29 L.Ed.2d 701 (1971). The Contracting Officer's conclusory response to Plaintiff's submissions informed neither Plaintiff nor the Court of the reasons Plaintiff's descriptions of materials developed at private expense were inadequate. Without a more sufficient indication of the basis of his decision the Court cannot effectively review the Contracting Officer's exercise of his statutory power to determine whether his action embodied an abuse of discretion or error of law.

The Court has scrutinized the asserted justification for the Contracting Officer's practice of not explaining his reasons for distinguishing Contract material developed at private expense from that generated by Government funding and is dissatisfied with the Government's position. Although, as the Government contends, it may be extremely burdensome for the Contracting Officer to investigate the accounting records of the contractor, the instant case has convinced the Court that there are situations of fact and characteristics of action in which a Contracting Officer's one sentence response to a detailed record undermines effective judicial review. Here, for example, no extensive investigation was demanded on the Contracting Officer since the contractor attempted to identify the source of expense for each page of data contained in the Reports. However, his impressions of the contractor's efforts, particularly at the June 26, 1972 conference, need elucidation and that need for the purposes of judicial review, outweighs any Governmental interest in avoiding administrative burdens.

Furthermore, the Government's reassurance to the Court that, as a matter of policy, the Government employees involved rarely challenge restrictive legends because of the resulting administrative burden falls short of its mark. The

Court firmly believes that an articulated basis for each of the Contracting Officer's decisions will offset any risk of an arbitrary departure from the aforementioned policy to the detriment of a contractor's property interests. See Environmental Defense Fund, Inc. v. Ruckelshaus, 142 U.S.App.D.C. 74, 439 F.2d 584 (1971); Environmental Defense Fund v. E.P.A., 150 U.S.App.D.C. 348, 465 F.2d 528 (1972).

Assuredly, the Court has no intention of substituting its judgment for that of the Contracting Officer, but it is the Court's duty to consider whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 824, 28 L.Ed.2d 136 (1971). Given that duty, the Court must have a meaningful indication in the record of the basis upon which the Contracting Officer acted. As Judge Leventhal recently commented in Portland Cement Association v. Ruckelshaus, (Slip Opinion No. 1073, June 29, (1973): "While we remain diffident in approaching problems of this technical complexity, * * * the necessity to review agency decision, if it is to be more than a meaningless exercise, requires enough steeping in technical matters to determine whether the agency 'has exercised a reasoned discretion.' Greater Boston TV v. FCC (*supra*)." Similarly in the case at bar, the Court must have a clarification of Armed Services Procurement Regulations' impact on Plaintiff's efforts to substantiate its claim that explains what factors were dispositive of the claim raised by Plaintiff.

The Court's requirement that the Contracting Officer provide a statement of reasons, where a contractor has attempted to substantiate its claim within the period provided under ASPR § 9-202.-3(d) and the Contracting Officer determines that effort inadequate, will not defeat countervailing Government interests. The time and energy expended by the Contracting Officer in complying with the

Court's demand that he provide a basis for his decision threatens no harm to the public's health and safety, or to national security, and does not compromise the performance of a vital governmental function. But the benefit of requiring such explanation is fundamental to our system of justice; there will be both a reduction in the possibility of error and the protection of the contractor against the precipitate use of governmental authority.

For the above reasons, the Court finds it necessary to remand the subject matter of this litigation to the Contracting Officer for a statement of reasons regarding his actions on the Contract before the Court.

APPENDIX E

Administrative Procedure Act 5 U.S.C. § 551 et seq. (1970)

§ 551. Definitions.

For the purpose of this subchapter—

(10) "Sanction" includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

Chapter 7.—Judicial Review

Sec.

701. Application; definitions.
702. Right of review.
703. Form and venue of proceeding.
704. Actions reviewable.
705. Relief pending review.
706. Scope of review.

§ 701. Application; definitions.

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

§ 702. Right of review.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

§ 703. Form and venue of proceeding.

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

§ 704. Actions reviewable.

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory

order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

§ 705. Relief pending review.

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

§ 706. Scope of review.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

PART 2—RIGHTS IN TECHNICAL AND OTHER DATA AND COPYRIGHTS

9-202 Acquisition of Rights in Technical Data.

9-202.1 *Background.*

(a) *Government's Interest in Technical Data.* The Government has extensive needs for many kinds of technical data. Its needs may well exceed those of private commercial customers. For defense purposes millions of separate equipment and supply items, ranging from standard to unique types, must be acquired, operated, and maintained, often at points remote from the source of supply. Functions requiring varied kinds of technical data include training of personnel, overhaul and repair, cataloging, standardization, inspection and quality control, packaging, and logistics operations. Data resulting from research and development contracts must be obtained, organized and disseminated to many different users. Finally, the Government must make technical data widely available in the form of contract specifications in order to obtain competition among its suppliers, and thus further economy in Government procurement.

(b) *Contractors' Interest in Technical Data.* Commercial organizations have a valid economic interest in data they have developed at their own expense for competitive purposes. Such data, particularly technical data which discloses details of design or manufacture, if often closely held because its disclosure to competitors could jeopardize the competitive advantage it was developed to provide. Public disclosure of such technical data can cause serious economic hardship to the originating company.

(c) *The Balancing of Interests.* It is apparent that there is no necessary correlation between Government's need for technical data and its contractors' economic interests therein. However, in balancing the Government's requirements for technical data against the contractor's interest in protecting his data, it should be recognized that there may be a considerable identity of interest. This is particularly true in the case of innovative contractors who can best be encouraged to develop at private expense items of military usefulness where their rights in such items are scrupulously protected. It is equally important that the Government foster successful contractual relationships and encourage a ready flow of data essential to Government needs by confining its acquisitions of technical data to cases of actual need. Certainly the Government must not be barred from bargaining and contracting to obtain such technical data as it needs, even though that data may normally not be disclosed in commercial practice. Moreover, when the Government pays for research and development work which produces new knowledge, products or processes, it has an obligation to foster technological progress through wide dissemination of the new and useful information derived from such work and where practicable to provide competitive opportunities for supplying the new products and utilizing the new processes. At the same time, acquiring, maintaining, storing, retrieving, and distributing technical data in the vast quantities generated by modern technology is costly and burdensome for the Government. For this reason alone, it would be necessary to control closely the extent and nature of data procurement. Such control is also necessary to insure Government respect for its contractors' economic interest in technical data relating to their privately developed items. The policies and procedures of this Part are framed in the light of these considerations.

9-202.2 *Policy.*

(a) *General.* It is the policy of the Department of Defense to acquire only such data and rights therein as are essential to meet Government needs.

(b) *Unlimited Rights.* Technical data in the following categories, when specified in any contract as being required

for delivery, or subject to order under the contract, shall be acquired with unlimited rights:

(1) technical data resulting directly from performance of experimental, developmental, or research work which was specified as an element of performance in a Government contract or subcontract;

(2) technical data necessary to enable others to manufacture end-items, components and modifications, or to enable them to perform processes, when the end-items, components, modifications or processes have been, or are being, developed under Government contracts or subcontracts in which experimental, developmental or research work was specified as an element of contract performance, except technical data pertaining to items, components or processes developed at private expense;

(3) technical data constituting corrections or changes to Government-furnished data;

(4) technical data pertaining to end-items, components or processes which was prepared for the purpose of identifying sources, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements ("form, fit and function" data, *e.g.*, specification control drawings, catalog sheets, envelope drawings, etc.);

(5) manuals or instructional materials prepared for installation, operation, maintenance or training purposes; and

(6) other technical data which has been, or in normally furnished without restriction by a contractor or subcontractor.

(c) *Limited Rights.* Except as provided in (b) above, technical data pertaining to items, components or processes developed at private expense will be acquired with limited rights if ordered.

(It should be clearly understood that the above statement of policy is a recital of rights to be acquired in certain categories of data if the data is called for under the contract. Neither the foregoing statement of data rights policy, nor its implementing paragraph (b)(1) and (2) of the Basic Data clause in 9-203(b), establishes data requirements for a particular contract. It should also be noted that data pertaining to items, components or processes developed at private expense may be called for, required, or otherwise furnished under (b)(1), (3), (4), (5) and (6) above and, as such, it will be acquired with unlimited rights. Contract clauses and the schedule establish the form and type of data to be furnished; the categories into which such delivered data fall, determine the rights to be obtained by the Government to use or publish such data.)

(d) *Predetermination of Rights in Data.* In order to assist in the timely and effective application of the policy in (b) and (c) above, the following procedures may be employed in negotiated contracts:

(1) The Government and the contractor may enter into an agreement, which shall be incorporated in the Schedule of the contract directly or by reference, and which shall, to the extent practicable, list or describe, either individually or by class—

(i) the technical data which falls within the six categories in (b) above and is therefore to be furnished with unlimited rights, and

(ii) the technical data described in (c) above which is to be furnished with limited rights.

This procedure shall not be used to require the contractor to furnish with unlimited rights data which, under the policy in (b) and (c) above, should be furnished with lim-

ited rights. However, the contracting officer may, if competitive procurement is desired, review the data proposed to be listed or described in (ii) above to determine whether to invoke the procedures of (g) below to purchase unlimited rights in any of the data. If such purchase is agreed upon, the lists or descriptions shall be adjusted to reflect the change.

(2) If, after execution of any negotiated contract in which experimental, developmental or research work is specified as an element of contract performance, the contractor wishes to use in the performance of the contract any end-item, component, modification or process the data for which is not listed or described in accordance with subparagraph (1) above, but which would be furnished with limited rights in accordance with the policy in (b) and (c) above, he shall be required to advise the contracting officer of this fact promptly; *provided,* that no such advice shall be required with respect to standard commercial items which are manufactured by more than one sources of supply. If the contracting officer agrees that under the policy stated in (b) and (c) above such data should be furnished with limited rights, he may then determine whether to invoke the procedures of (g) below to purchase unlimited rights in such data. The lists or descriptions in (1) above shall be adjusted to reflect the changes required by the foregoing procedure.

(e) *Subcontracts.* It is the policy of the Department of Defense that prime contractors and higher-tier subcontractors shall not use their power to award subcontracts as economic leverage to acquire rights in the data of their subcontractors for themselves. Accordingly, when there is a requirement in the prime contract or deferred order for data to be supplied with limited rights pursuant to (c) above, and such data is to be obtained from a subcontractor, the subcontractor may submit such data directly to the Government rather than through the prime contractor.

(f) *Deferred Ordering of Technical Data.*

(1) The Government may defer selection and delivery of all or any portion of the data specified in the contract until actual requirements can be economically determined. Accordingly, the Government may request the contractor to deliver any such data or portions thereof at any time during the performance of the contract or within two years from either acceptance of all items (other than data) under the contract or termination of the contract, whichever is later. However, the contractor's obligation to deliver data pertaining to any item obtained from a subcontractor shall cease two years after the date on which he accepts the item. The Government may make any number of orders for technical data, but each order shall be made sufficiently in advance of the required delivery date to enable the contractor to provide data in the specified format.

(2) The price of the work includes the Government's right to use such data as prescribed in the contract, and no additional payment shall be made to the contractor with respect to rights in such data. However, at the time of delivery payment shall be made, by equitable adjustment or otherwise, for convérting the data into the prescribed form, reproducing it, and preparing it for delivery.

(g) *Specific Acquisition of Data and Rights.*

(1) Notwithstanding any other provision of this Part, the Government may acquire unlimited rights in any data by means of negotiation with an individual contractor or subcontractor, or as a part of a competition among several contractors or subcontractors. Such individual negotiation or competition may be conducted either by the Government, or upon Government request by the prime contractor or higher-tier subcontractor. Any such data shall be stated in the contract schedule as a separate item and shall be separately priced. No data or rights therein shall be acquired under this paragraph unless it is determined after a finding

upon a documented record by the Head of the Procuring Activity or his designee that:

(i) there is a clear need for reprocurement of the item, component or process to which the technical data pertains;

(ii) there is no suitable item, component or process of alternate design or availability;

(iii) the item or component can be manufactured or the process performed through the use of such technical data by other competent manufacturers, without the need for additional technical data which cannot be purchased reasonably or is not readily obtained by other economic means; and

(iv) anticipated net savings in reprocurements will exceed the acquisition cost of the technical data and rights therein.

(2) The analysis and findings referred to in (1) above shall specifically identify each component and the particular data therefore which is to be purchased.

9-202.3 *Procedures.*

(a) *Deviations.* The authority of 1-109.2 to make or authorize deviations affecting only one contract or transaction shall not apply to this Part 2, but such deviations shall be processed in accordance with the provisions of 1-109.3.

(b) *Establishing the Government's Rights to Use Technical Data Acquired.* All technical data specified in a contract or subcontract for delivery thereunder shall be acquired subject to the rights established in the appropriate Rights in Technical Data clauses set forth in this Part. Except as provided in 1-1707 and Section XVIII, Part 9, no other clauses, directives, standards, specifications or other implementation shall be included, directly or by ref-

erence, to enlarge or diminish such rights. The Government's acceptance of technical data subject to limited rights does not impair any rights in such data to which the Government is otherwise entitled or impair the Government's right to use similar or identical data acquired from other sources.

(c) *Marking and Identification of Technical Data.* Technical data delivered to the Government pursuant to any contract requirement shall be marked with the number of the prime contract, and the name and address of the contractor or subcontractor who generated the data. When technical data is received subject to limited rights, such identifying markings and the authorized restrictive legend shall be maintained on all reproductions thereof.

(d) *Unmarked or Improperly Marked Technical Data.*

(1) Technical data received without a restrictive legend shall be deemed to have been furnished with unlimited rights. However, the contracting officer may permit the contractor to place a restrictive legend on such data within six months of its delivery if the contractor demonstrates that the omission of the legend was inadvertent and the use of the legend is authorized.

(2) Technical data received with a restrictive legend not permitted by the terms of the contract shall be used with limited rights pending inquiry to the contractor whose name appears on the data as the originator. If no response to a properly directed inquiry has been received within 60 days, or if the response fails to show that the restriction was authorized, the cognizant Government personnel shall obliterate such legend, notify the contractor accordingly, and thereafter may use such data as if it were acquired with unlimited rights.

(3) If the contract authorizes the contractor to furnish technical data with limited rights, but the restrictive legend employed by the contractor is not in the form prescribed

by the content, the data shall be used with limited rights, and the contractor shall be required to amend the legend to conform with that specified in the contract. If the contractor fails to so amend the legend within 60 days after notice, the cognizant Government personnel shall obliterate the legend, notify the contractor accordingly, and thereafter may use such data with unlimited rights.

(e) *Technical Data Furnished on a Restricted Basis in Support of a Proposal.* When the contracting officer contemplates awarding a contract on a solicited or unsolicited proposal which was offered on a restricted basis (see 3-507 and 4-106.1), he shall ascertain whether to acquire rights to use all or part of the technical data furnished with the proposal. If such rights are desired, the contracting officer shall negotiate with the offeror in accordance with the policies set forth in this paragraph 9-202. If the offerer agrees to furnish the technical data under the contract, the appropriate clause in 9-203 shall be inserted in the contract, and the contract shall identify the data to be covered by the clause.

(f) *Delivery of Technical Data to Foreign Governments.* As provided in 9-201(b), limited rights include the right of the Government to deliver the technical data to foreign governments as the national interest of the United States may require, subject to the same limitations which the Government accepts for itself. When the Government proposes to make technical data subject to limited rights available for use by a foreign government, it will, to the maximum extent practicable, give reasonable notice thereof to the contractor or subcontractor who generated the technical data and whose name and address appears thereon.

9-203 Contract Clauses.

(a) *General.* In every contract in which technical data is specified to be delivered, insert the clause in (b) below, *provided* that such clause shall not be used in contracts

(i) when all technical data to be delivered is to be acquired with unlimited rights pursuant to 9-202.2(g), in which case the clause in (d) below shall be used;

(ii) when existing works are acquired in accordance with 9-205;

(iii) when the clause in 9-204 is used in accordance with the provisions of 9-204.2; or

(iv) to be performed outside the United States, its territories, possessions, or Puerto Rico, in which case the clause in 9-206 applies.

In negotiated contracts in which experimental, developmental or research work is specified as an element of contract performance and the contracting officer uses the procedure of 9-202.2(d) concerning predetermination of rights in data, the paragraph in (c) below will be added to the Basic Data clause in (b) below. In any contract in which the ordering of data is to be deferred, the clause in (e) below is to be included.

(b) *Basic Data Clause.*

RIGHTS IN TECHNICAL DATA (FEB. 1965)

(a) *Definitions.*

(1) *Technical Data,* as used in this clause, means technical writing, sound recordings, pictorial reproductions, drawings, or other graphic representations and works of a technical nature, whether or not copyrighted, which are specified to be delivered pursuant to this contract. The term does not include financial reports, cost analyses, and other information incidental to contract administration.

(2) *Limited Rights* means rights to use, duplicate, and disclose technical data in whole or in part, by or for the Government, with the express limitation that such data may not be released outside the Government, used, duplicated, or disclosed in whole or in part, for manufacture or procurement, except for:

(i) emergency repair or overhaul work by or for the Government where the item or process concerned is not otherwise reasonably available to enable timely performance of the work; and

(ii) release to a foreign government as the interests of the United States may require;

provided, in either case, that the release of such data shall be subject to the limitations of this paragraph (2).

(3) *Unlimited Rights* means rights to use, duplicate or disclose technical data, in whole or in part, in any manner and for any purpose whatsoever, and to have or permit others to do so.

(b) *Government Rights.*

(1) The Government shall have unlimited rights in:

(i) technical data resulting directly from performance of experimental, developmental or research work which was specified as an element of performance in this or any other Government contract or subcontract;

(ii) technical data necessary to enable manufacture of end-items, components and modifications, or to enable the performance of processes, when the end-items, components, modifications or processes have been, or are being, developed under this or any other Government contract or subcontract in which experimental, developmental or research work is, or was specified as an element of contract performance, except technical data pertaining to items, components or processes developed at private expense (but see (2) (ii) below);

(iii) technical data constituting corrections or changes to Government-furnished data;

(iv) technical data pertaining to end-items, components or processes which was prepared for the purpose of identifying sources, size, configuration, mating

and attachment characteristics, functional characteristics and performance requirements ("form, fit and function" data, *e.g.,* specification control drawings, catalog sheets, envelope drawings, etc.);

(v) manuals or instructional materials prepared for installations, operation, maintenance or training purposes;

(vi) other technical data which has been, or is normally furnished without restriction by the Contractor or subcontractor; and

(vii) technical data listed or described in an agreement incorporated into the Schedule of this contract, which the parties have predetermined, on the basis of subparagraphs (i) thru (vi) above, and agreed will be furnished with unlimited rights.

(2) The Government shall have limited rights in:

(i) technical data, listed or described in an agreement incorporated into the Schedule of this contract, which the parties have agreed will be furnished with limited rights; and

(ii) technical data pertaining to items, components or processes developed at private expense, other than such data as may be included in the data referred to in (b)(1)(i), (iii), (iv), (v), and (vi);

provided that each piece of data to which limited rights are to be asserted pursuant to 2)(i) and (ii) above is marked with the following legend in which is inserted the number of the prime contract under which the technical data is to be delivered and the name of the Contractor or subcontractor by whom the technical data was generated:

Furnished under United States Government Contract No. _____. Shall not be either released outside the Government, or used, duplicated, or disclosed in whole or in part for manufacture or procurement, without the written permission of _____, except for: (i) emergency repair or overhaul work by or for the Government, where the item or process concerned is not otherwise reasonably available to enable timely performance of the work; or (ii) release to a foreign government, as the interests of the United States may require;

provided that in either case the release, use, duplication or disclosure hereof shall be subject to the foregoing limitations. This legend shall be marked on any reproduction hereof in whole or in part.

No legend shall be marked on, nor shall any limitation on rights of use be asserted as to, any data which the Contractor has previously delivered to the Government without restriction. The limited rights provided for by this paragraph (b)(2) shall not impair the right of the Government to use similar or identical data acquired from other sources.

(c) *Material Covered by Copyright.*

(1) Notwithstanding the provisions of (b) above, the Contractor agrees to and does hereby grant to the Government, and to its officers, agents, and employees acting within the scope of their official duties, a royalty-free, nonexclusive and irrevocable license throughout the world for Government purposes to publish, translate, reproduce, deliver, perform, dispose of, and to authorize others so to do, all technical data now or hereafter covered by copyright.

(2) No such copyrighted matter shall be included in technical data furnished hereunder without the written permission of the copyright owner for the Government to use such copyrighted matter in the manner described above.

(3) The Contractor shall report to the Government (or higher-tier Contractor) promptly and in reasonable written detail each notice or claim of copyright infringement received by the Contractor with respect to any technical data delivered hereunder.

(d) *Removal of Unauthorized Markings.* Notwithstanding any provisions of this contract concerning inspection and acceptance, the Government may modify, remove, obliterate, or ignore any marking not authorized by the terms of this contract on any technical data furnished hereunder, if—

(i) the Contractor fails to respond within sixty (60) days to a written inquiry by the Government concerning the propriety of the use of the marking, or

(ii) the Contractor's response fails to substantiate his contention that the use of the marking is authorized,

in which case the Government shall give written notice to the Contractor.

(e) *Relation to Patents.* Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government under any patent.

(f) *Limitation on Charges for Data.* The Contractor recognizes that the Government, or a foreign government with funds derived through the Military Assistance Program or otherwise through the United States Government, may contract for property or services with respect to which the vendor may be liable to the Contractor for charges for the use of technical data on account of such a contract. The Contractor further recognizes that it is the policy of the Government not to pay in connection with its contracts, or to allow to be paid in connection with contracts made with funds derived through the Military Assistance Program or otherwise through the United States Government, charges for data which the Government has a right to use and disclose to others, which is in the public domain, or which the Government has been given without restrictions upon its use and disclosure to others. This policy does not apply to reasonable reproduction, handling, mailing, and similar administrative costs incident to the furnishing of such data. In recognition of this policy, the Contractor agrees to participate in and make appropriate arrangement for the exclusion of such charges from such contracts, or for the refund of amounts received by the Contractor with respect to any such charges not so excluded.

(g) *Acquisition of Data from Subcontractors.*

(1) Whenever any technical data is to be obtained from a subcontractor under this contract, the Contractor shall use this same clause in the subcontract, without alteration, and no other clause shall be used to enlarge or diminish the Government's or the Contractor's rights in that subcontractor data which is required for the Government.

(2) Technical data required to be delivered by a subcontractor shall normally be delivered to the next higher-tier Contractor. However, when there is a requirement in the prime contract, or in the deferred order, for data which

may be supplied with limited rights pursuant to (b)(2) above, a subcontractor may fulfill such requirement by submitting such data directly to the Government rather than through the prime Contractor.

(3) The Contractor and higher-tier subcontractors will not use their power to award subcontracts as economic leverage to acquire rights in data from their subcontractors for themselves.

(c) *Notice of Certain Limited Rights.* The paragraph (h) set forth below shall be added to the clause in (b) above in all negotiated contracts in which experimental, developmental or research work is specified as an element of contract performance and in which the procedure of 9-202.2(d), concerning predetermination of rights in data, is to be followed:

(h) The Contractor will promptly notify the Contracting Officer in writing of the intended use in the performance of the contract of any end-item, component, modification or process for which the Contractor intends to furnish data with limited rights; *provided,* that no such notice is required with respect to standard commercial items which are manufactured by more than one source of supply or with respect to data which the parties have specified in the Schedule would be furnished with limited rights. Subcontractors will notify the next higher-tier Contractor. (FEB. 1965)

(d) *Technical Data Clause—Specific Acquisition.* The following clause shall be used in contracts in which all technical data is to be acquired with unlimited rights pursuant to 9-202.2(g). In addition, if the Government has determined to acquire all technical data with unlimited rights from a subcontractor pursuant to 9-202.2(g), the following clause shall be used in the subcontract in lieu of the Rights in Technical Data clause whether or not the prime contract makes provision therefor. The clause shall not be used under any other circumstances.

RIGHTS IN TECHNICAL DATA—SPECIFIC ACQUISITION (MAY 1964)

(a) *Definition. Technical Data* as used in this clause means technical writings, sound recordings, pictorial reproductions, drawings, or other graphic representations and works of a technical nature, whether or not copyrighted, which are specified to be delivered pursuant to this contract. The term does not include financial reports, cost analyses, and other information incidental to contract administration.

(b) *Government Rights.* The Government may duplicate, use and disclose in any manner and for any purpose whatsoever, and have others so do, all or any part of the technical data delivered by the Contractor to the Government under this contract.

(c) *Material Covered by Copyright.*

(1) The Contractor agrees to and does hereby grant to the Government, and to its officers, agents, and employees acting within the scope of their official duties, a royalty-free, nonexclusive and irrevocable license throughout the world for Government purposes to publish, translate, reproduce, deliver, perform, dispose of, and to authorize others so to do, all technical data now or hereafter covered by copyright.

(2) No such copyrighted matter shall be included in technical data furnished hereunder without the written permission of the copyright owner for the Government to use such copyrighted matter in the manner above described.

(3) The Contractor shall report to the Government (or higher-tier Contractor) promptly and in reasonable written detail each notice or claim of copyright infringement received by the Contractor with respect to any technical data delivered hereunder.

(d) *Relation to Patents.* Nothing contained in this clause shall imply a license to the Government under any patent, or be construed as affecting the scope of any license or other right otherwise granted to the Government under any patent.

(e) *Limitation on Charges for Data.* The Contractor recognizes that the Government, or a foreign government with funds derived through the Military Assistance Pro-

gram or otherwise through the United States Government, may contract for property or services with respect to which the vendor may be liable to the Contractor for charges for the use of technical data on account of such a contract. The Contractor further recognizes that it is the policy of the Government not to pay in connection with its contracts, or to allow to be paid in connection with contracts made with funds derived through the Military Assistance Program or otherwise through the United States Government, charges for data which the Government has a right to use and disclose to others, which is in the public domain, which the Government has been given without restrictions upon its use and disclosure to others. This policy does not apply to reasonable reproduction, handling, mailing and similar administrative costs incident to the furnishing of such data. In recognition of this policy, the Contractor agrees to participate in and make appropriate arrangements for the exclusion of such charges from such contracts, or for the refund of amounts received by the Contractor with respect to any such charges not so excluded.

(e) *Deferred Ordering of Technical Data.* When the ordering of technical data is to be deferred, the following additional clause shall be included in the prime contract.

DEFERRED ORDERING OF TECHNICAL DATA
(MAY 1964)

The Government shall have the right to order, at any time during the performance of this contract, or within two (2) years from either acceptance of all items (other than data) to be delivered under this contract or termination of this contract, whichever is later, any data called for in the Schedule of this contract, and the Contractor shall promptly prepare and deliver such data as is ordered. However, the Contractor shall be relieved of the obligation to furnish data pertaining to an item obtained from a subcontractor upon the expiration of two (2) years from the date he accepts the item. When the data is delivered, payment shall be made, by equitable adjustment or otherwise, for converting the data into the prescribed form, reproducing it, and preparing it for delivery. Such payment shall not be included in the application of any incentive pricing formula.

Supreme Court, U. S.
FILED
NOV 28 1975
MICHAEL RODAK, JR., CLERK

No. 75-422

In the Supreme Court of the United States

OCTOBER TERM, 1975

INTERNATIONAL ENGINEERING COMPANY, ETC., PETITIONER

v.

DONALD H. RUMSFELD
SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends that the court of appeals erred in holding that this action arose out of a breach of contract and was cognizable only in the Court of Claims.

On July 7, 1969, the Air Force entered into a contract with petitioner International Engineering Company for the design, construction, and testing of a model of a long-range navigation bomb/missile guidance system, the performance of certain laboratory and helicopter flight tests, and the delivery of a final report analyzing the results of the tests (Pet. App. A-1 to A-2). Pursuant to the Armed Services Procurement Regulations ("ASPR"), 32 C.F.R. 1.100, *et seq.*, the contracting officer incorporated by reference in the agreement some 44 standardized ASPR contractual provisions, including the standard "Rights in Technical Data" clause, ASPR 7.104-9(a), and the "disputes" clause, ASPR 7.103-12, which

establishes a mechanism for resolving contractual disagreements (Pet. App. A-2).

In March 1971, the Air Force requested that petitioner provide further information required under the contract concerning the components and processes of the system in order to facilitate evaluation of the test results (Pet. App. A-2). Petitioner submitted this data both in an interim report and in final report No. 70-06-4. Pursuant to the procedure established by the Rights in Technical Data clause, both reports bore a "limited rights" legend, which, if justifiably affixed, would have prevented the Air Force from disseminating this information to any person not within the government (Pet. App. A-2). The contracting officer questioned the propriety of the legend and requested that petitionner furnish substantiating information, as required by that contractual provision.[1] Petitioner responded that the unit incorporating its alleged trade secrets had been developed at its own expense and that it therefore possessed the right to limit distribution of that information (Pet. App. A-2).

On December 10, 1971, petitioner submitted its final report No. 71-09 under the last modification of the contract. This report contained a limited rights legend with regard to the same data as before (Pet. App. A-3). The contracting officer notified petitioner that pursuant to the Rights in Technical Data clause, the report would not be accepted unless petitioner either removed or substantiated its

[1]The Rights in Technical Data clause places the burden of substantiating the propriety of restrictive legends on the contractor since all pertinent records are in its possession and many important details concerning the development of proprietary information are known only to its employees (Pet. App. A-5, n. 2).

proprietary markings (Pet. App. A-3). After lengthy correspondence and a series of meetings, the contracting officer found that the statements submitted by petitioner had not substantiated the propriety of the legend (Pet. App. A-4 to A-5).[2]

On the day after it was informed of this decision, petitioner instituted this action in the United States District Court for the District of Columbia, seeking declaratory and injunctive relief from the contracting officer's decision. Petitioner alleged that that decision constituted final agency action reviewable under Section 10(a) of the Administrative Procedure Act, 5 U.S.C. 702 ("APA"), and that the contracting officer's actions were unlawful (Pet. App. A-5). The district court held that it had jurisdiction over the action and ordered the contracting officer to submit a more detailed explanation of his reasons for determining that the limited rights legend should be deleted (Pet. App. D-1 to D-12). Upon consideration of his report, the district court issued a preliminary injunction prohibiting removal of the legend (Pet. App. B-1 to B-30).

The court of appeals reversed and remanded with instructions to vacate the injunction and dismiss the case for lack of subject matter jurisdiction (Pet. App. A-1 to A-15). Concluding that, in essence, the complaint stated a claim for breach of contract (Pet. App. A-9), the court held that the decision of the contracting officer did not constitute agency action and that the waiver of sovereign immunity contained in the APA was therefore inapplicable (Pet. App. A-12 to A-13). It reasoned that a finding

[2]The Air Force agreed to treat the data as if it possessed limited rights, pending the district court's ruling on the motion for a preliminary injunction.

that the APA applied under these circumstances would significantly impair the jurisdiction of the Court of Claims (Pet. App. A-9). The court further held that under 5 U.S.C. 704, the district court in any event lacked jurisdiction because petitioner possessed an adequate remedy in another court (Pet. App. A-14). The court of appeals therefore concluded that petitioner's sole remedy was to file suit in the Court of Claims under the Tucker Act.

1. The United States cannot be sued without its consent, but when Congress elects to waive its sovereign immunity, that consent may be subject to appropriate conditions. *United States* v. *Sherwood*, 312 U.S. 584. Under the Tucker Act, 28 U.S.C. 1346(a) and 1491, the United States has submitted to suit in contract actions under limited circumstances. The Court of Claims and the district courts have concurrent jurisdiction over claims of less than $10,000;[3] but the Court of Claims has exclusive jurisdiction of claims for over $10,000. Its jurisdiction is limited to the award of monetary damages; it may grant neither injunctive nor declaratory relief. *Glidden Company* v. *Zdanok*, 370 U.S. 530, 557; *United States* v. *King*, 395 U.S. 1.

The court of appeals correctly determined that this litigation is an action for breach of contract, whose resolution requires interpretation of clauses in the underlying agreement to determine the government's rights to certain

[3]Although a district court has jurisdition to adjudicate contract claims of less than $10,000, in exercising that jurisdiction, it lacks authority to consider requests for declaratory and injunctive relief. *Richardson* v. *Morris*, 409 U.S. 464, 466.

information (Pet. App. A-9).[4] At issue are the Air Force's rights to allegedly proprietary data initially disclosed to it under a trade secret licensing agreement (Pet. App. A-11, n. 7). The case therefore falls within the Tucker Act and jurisdiction lies in the Court of Claims,[5] not in the district court (Pet. App. A-9 to A-11).[6]

2. Petitioner contends (Pet. 22-24) that the district court had jurisdiction to entertain this action under Section 10(a) of the Administrative Procedure Act, 5 U.S.C. 702. It argues that the contracting officer's decision to strike the limited rights legend constituted a "sanction" and was therefore "agency action" reviewable in the district court. 5 U.S.C. 551(10)(D), (13). But the court of appeals properly rejected this argument, determining that in enacting the APA, Congress did not intend to enlarge by implication the narrow waiver of sovereign immunity granted by the Tucker Act (Pet. App. A-13).

[4]Petitioner's contention (Pet. 13-14) that the procedures followed by the contracting officer denied it due process is simply an effort to recast its contract claim in constitutional verbiage. This agrument merely restates petitioner's position that the contracting officer's action constituted breach of contract.

[5]Since the verified complaint alleged that the amount in controversy exceeded $10,000, this action could only be brought in the Court of Claims.

[6]Where the government uses another's trade secret beyond the scope of the license, the owner's rights stem from the violation of that agreement. The government may be sued for breach of contract but not in tort under the Federal Tort Claims Act. 28 U.S.C. 2680(h); *Woodbury* v. *United States*, 313 F.2d 291 (C.A. 9); *Aktiebolaget Bofors* v. *United States*, 194 F.2d 145 (C.A. D.C.).

Petitioner has cited no authority supporting its contention that the contracting officer's determination that petitioner had not substantiated the propriety of its restrictive legend was a "sanction" (see Pet. 22). Nor has it pointed to any portion of the legislative history of the APA, or any judicial decision thereunder, that suggests that Congress intended, in enacting the APA, to provide private contractors with a means for avoiding the jurisdiction of the Court of Claims. Other courts that have considered this issue have concluded that Congress did not intend this result. *Warner* v. *Cox*, 487 F.2d 1301, 1306 (C.A. 5); see *Aktiebolaget Bofors* v. *United States*, 194 F.2d 145 (C.A. D.C.). As a matter of statutory construction, absent an express statement of congressional intent, the APA should not be interpreted as modifying the Tucker Act's measured waiver of sovereign immunity or superseding the adminstrative mechanism for adjudicating disputes such as this before the Armed Services Board of Contract Appeals (Pet. App. A-13 to A-14). See also *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682.

Furthermore, Section 10(c) of the Administrative Procedure Act, 5 U.S.C. 704, provides that a final agency action for which there is another adequate remedy in any court is not subject to judicial review under the Act. The court below found that the award of damages by the Court of Claims for breach of contract would be an adequate remedy[7] and that the APA therefore did not apply (Pet. App. A-14 to A-15).

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[7]The district court had found that the United States was the only potential purchaser of the alleged proprietary information (Pet. App. A-8 to A-9). The complaint alleges that petitioner offered to sell the data to the Air Force, which indicates that it believed a fair monetary value could be determined (Complaint, para. 62, p. 27). See *Padbloc Company, Inc.* v. *United States*, 161 Ct. Cl. 369.

See *Mohawk Airlines, Inc.* v. *Civil Aeronautics Board*, 329 F.2d 894 (C.A. D.C.).[8] Accordingly, resolution of this case does not require consideration of the question whether the APA waives sovereign immunity; whether it does or not is irrelevant here because the APA by its terms does not apply.[9]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

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[8]Petitioner alleges (Pet. 12-13) that this decision of the court of appeals is inconsistent with its holding in *Charles River Park "A", Inc.* v. *Department of Housing and Urban Development*, 519 F.2d 935 (C.A. D.C.). Plaintiff instituted that action to enjoin HUD from disclosing sensitive financial information it had previously submitted. The court remanded the action to the district court to determine whether the Freedom of Information Act, 5 U.S.C. 552, or a criminal disclosure statute, 18 U.S.C. 1905, prevented disclosure of confidential information that the agency wished to divulge; and if they were found not to apply, then to balance the interests of the parties to determine what information could be released. That action is patently unrelated to the issues in the instant case. In any event,even a real intra-circuit conflict would not warrant review by this Court.

[9]Furthermore, the question whether suit in an alternative forum affords an "adequate" remedy is in large part factual. Petitioner's contentions (Pet. 14-19) that suit in the Court of Claims would not afford an "adequate" remedy, and that it may be irreparably injured, raise essentially factual issues that do not warrant further review.

Supreme Court, U. S.
FILED
DEC 8 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-422

INTERNATIONAL ENGINEERING COMPANY, A Division of A-T-O, INC., *Petitioner,*

v.

DONALD H. RUMSFELD, Secretary of Defense, ET AL., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO RESPONDENTS' MEMORANDUM IN OPPOSITION

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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REPLY TO RESPONDENTS' MEMORANDUM IN OPPOSITION

PRELIMINARY STATEMENT

This Memorandum is filed in reply to Respondents' Memorandum dated November, 1975.

ERRORS IN RESPONDENTS' FACTUAL STATEMENT

Respondents make two major erroneous assertions of fact:

A. Respondents assert that Petitioner's contract, which Respondents erroneously characterize as a "licensing agreement" (Resp. Mem. 5), required Petitioner to give the Air Force the data which it later de-

cided to disclose to Petitioner's competitors (Resp. Mem. 2). But the District Court specifically found to the contrary. Finding of Fact No. 45; Conclusion of Law No. 3. Pet. App. C-17-18. Petitioner furnished the data at issue to the Air Force at its request for evaluation purposes only. The District Court found that the Air Force never had any contractual right or "license" to disclose Petitioner's trade secrets. The Court of Appeals did not disturb this finding of the District Court.

B. Petitioner did not, as Respondents imply, (Resp. Mem. 3) ask the District Court to enjoin a contracting officer's decision. Indeed, the District Court found that the decision to disclose Petitioner's data was considered at the highest levels of the Air Force by officials who included the Secretary, the Air Force Chief of Staff, the Commander, Air Force Systems Command, and the Commander, Electronic Systems Division. District Court Findings of Fact Nos. 37-43, Pet. App. C-15-17. Thus, the final determination to release Petitioner's trade secrets clearly represents action of the highest levels of the Air Force—not the action of the contracting officer.

ERRORS IN RESPONDENTS' LEGAL ARGUMENT

Respondents make essentially three points:

1. Respondents contend that the central issue is whether the Air Force breached a contract clause by deciding to disclose Petitioner's trade secrets without holding a prior hearing. Indeed, Respondents make the bizarre assertion that the Air Force's failure to give Petitioner a hearing is only "a contract claim in constitutional verbiage." Resp. Mem. 5.

But Petitioner's rights in its trade secrets and its remedies to protect those trade secrets are not derived from any contract. Respondent's memorandum is strangely silent as to the due proces clause of the Fifth Amendment, and the provisions of Armed Services Procurement Regulation Section IX, Part 2 which are regulatory, not contractual—and on which Petitioner relies. Pet. 20-22. Thus, this case falls within the jurisdiction of the district courts, which have always had the power to grant relief to provide protection against due process violations by Government officials. *See, e.g., Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Greene* v. *McElroy*, 360 U. S. 474 (1959).[1]

2. Respondents assert that the Administrative Procedure Act does not apply to this case because Petitioner has an adequate remedy in an action at law for damages[2] for breach of contract in the Court of Claims. Resp. Mem. 6-7.

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[1] It must be emphasized that the Defense Department has promulgated a *regulatory*, not a contractual, scheme to balance conflicting interests in data disclosed to Department officials. For example, the decision to release privately originated data in a competitive procurement is governed by the regulatory provisions of ASPR 1-304.1 and ASPR § IX, Part 2. *See*, 32 C.F.R. § 1.304-1 (1974). Regulations, not contract clauses, also control specific dealings between individual companies and the Department. For example, Petitioner's offer to sell its data, which Respondents briefly mention (Resp. Mem. 6, fn. 7), and any negotiations concerning that offer are not governed by a contract clause but instead are governed by a regulation, ASPR 9-202.2(f), 32 C.F.R. § 9.202.2 (f) (1974). An antecedent version of this regulation appears at Pet. App. E-11-12.

[2] In a footnote, Respondents assert that Petitioner's offer to negotiate a sale of its data under ASPR § 9-202.2(f) indicates that the data's value can be ascertained. Resp. Mem. 6, fn. 7. But Petitioner's offer does not even suggest that Petitioner could provide adequate proof in a breach of contract action of the damages it would suffer if its data were disclosed.

The amazing feature of Respondents' assertion is that they have no answer whatever to make to the massive collection of cases cited in our Petition holding that an action at law for damages is not an adequate remedy for the threatened disclosure of trade secrets. *See* Pet. 16. There being no adequate remedy at law, equitable relief is proper.

Moreover, Respondents' assertion that the "adequacy" of a remedy in the Court of Claims "do(es) not warrant further review" because it "raise(s) essentially factual issues," is in error. Resp. Mem. 7, fn. 9.

The Court of Appeals' holding on the "adequacy" of an action in the Court of Claims does not depend on any finding of fact by the District Court. Pet. App. A-14-15. To the contrary, the District Court's findings support Petitioner's contention that damages do not provide an adequate remedy. *See*, Finding of Fact No. 47, Pet. App. C-17. *See also*, Conclusion of Law No. 8, Pet. App. C-19-20.

The Court of Appeals ruled as a matter of law that damages are an adequate remedy for the Government's disclosure of data. This ruling extinguishes the District Court's jurisdiction even to consider, whether as a matter of fact, a damages award could actually provide adequate compensation to the originator of illegally disclosed trade secrets. Whether the District Court has *jurisdiction* to determine if damages are an "adequate remedy" for the illegal disclosure of trade secrets by the Government, is not a "factual" issue. It is a legal issue, that is before this Court in a case

whose facts will recur again and again.[3] And, see *Stratton* v. *St. Louis Southwestern Railway Co.*, 284 U.S. 530, 534 (1932).

3. Respondents contend that the decision by Air Force officials to disclose Petitioner's trade secrets did not constitute "agency action." Resp. Mem. 6. But they have not cited any authority in support of their assertion.

Interestingly enough, Respondents do not dispute that the express terms of the Administrative Procedure Act show that the decision to disclose Petitioner's trade secrets was "agency action." The APA includes "sanctions" in its definition of "agency action." "Sanctions" are defined in part as the "*destruction*, taking, seizure, or withholding of property." (emphasis added) 5 U.S.C. § 551 (10)(D) (1970) (Pet. App. E-1). The District Court held that the "destruction" of Petitioner's property rights in its trade secrets would be the inevitable consequence of the decision to

[3] Indeed, the same question has already arisen in another case where a developer of machine components attempted to enjoin the Government's disclosure of its trade secrets. The contractor's motion for a preliminary injunction was denied on the authority of the Court of Appeals' opinion in our case. The contractor's appeal is now pending before the D.C. Circuit. *Computer Machining Technology Corporation* v. *Schlesinger*, No. 75-1927 (D.C. Cir.). *See also, Planning Research Corporation* v. *Federal Power Commission*, No. 75-1540 (D.C. Cir.) (appeal pending) where the plaintiff sued to enjoin the FPC's compliance with a Freedom of Information Act request for confidential data. PRC had submitted the data in a technical proposal that was later incorporated by reference into a contract between PRC and the FPC. The District Court ruled that the case was basically a dispute over a contract. It dismissed for lack of jurisdiction, citing the Court of Appeals' decision in our case.

remove Petitioner's restrictive legends from its data and disclose it to Petitioner's competitors. See District Court Conclusion of Law No. 9, Pet. App. C-20. The Court of Appeals did not question this holding.

Respondents also assert that there is no case which construes the APA as "a means for avoiding the jurisdiction of the Court of Claims." Resp. Mem. 6. But Petitioner makes no such contention. On the other hand, there is no case which holds that review under the Administrative Procedure Act should not be allowed when there is no adequate remedy in the Court of Claims for illegal agency action. And we have shown that an action at law for breach of contract in the Court of Claims would be totally inadequate as a remedy for the threatened disclosure of Petitioner's trade secrets. Pet. 14-19.[4]

Finally, Respondents do not deny that issues of true public importance are raised by this case.[5] This Court

[4] Respondents imply that Petitioner has failed to exhaust an administrative remedy before the Board of Contract Appeals. Resp. Mem. 6. The District Court found that no such remedy was available to Petitioner. Pet. App. D-8. The Court of Appeals did not question this finding of the District Court, and it is still the law of the case.

[5] This case has been the subject of extensive commentary from the publication of the first District Court opinion to the filing of the petition for certiorari. *See*, e.g., *BNA Federal Contracts Report* No. 599, September 29, 1975, which reprinted lengthy excerpts from the petition for certiorari at D-1-5; 17 *The Government Contractor* ¶ 237, No. 12, June 19, 1975, which characterized the Court of Appeals' decision as a "landmark," at 6; BNA *Federal Contracts Report* No. 580, May 12, 1975 at A-1; BNA *Federal Contracts Report* No. 562, December 30, 1974 at K-10-11; BNA *Federal Contracts Report* No. 553, October 28, 1974 at A-7; BNA *Federal Contracts Report* No. 512, January 7, 1974 at K-1-3; BNA *Federal Contracts Report* No. 504, November 5, 1973 at A-1; BNA *Federal Contracts Report* No. 490, July 23, 1973 at A-3-5; 16 *The Government Contractor* ¶ 81, No. 5, March 4, 1974; 15 *The Government Contractor* ¶ 357, No. 19, September 17, 1973; J. Whelan & R. Pasley, *Cases and Materials on Federal Government Contracts* 307 (1975).

should grant a writ of certiorari to restore the proper jurisdictional boundaries between the district courts and the Court of Claims, and to protect the rights of individuals who have disclosed data worth billions of dollars to the Government with the clear understanding that such data would be protected in accordance with Departmental Regulations. See *Brief of the National Security Industrial Association as Amicus Curiae in Support of the Petition* at 4-15.

Respectfully submitted,

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Dated: December 8, 1975

Supreme Court, U. S.
OCT 1 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

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v.

JAMES R. SCHLESINGER, Secretary of Defense, ET AL., *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals, District of Columbia Circuit

BRIEF OF THE NATIONAL SECURITY INDUSTRIAL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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BRIEF OF THE NATIONAL SECURITY INDUSTRIAL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION

PRELIMINARY STATEMENT

This brief is filed by the National Security Industrial Association (hereinafter NSIA) as *amicus curiae*, pursuant to the written consent of the Petitioner and Respondent which are on file with the Court. NSIA is a non-profit association of approximately two hundred fifty American industrial and research companies.

Its membership includes both large and small companies providing products and services to the United States Government.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 512 F.2d 573 and is also reproduced in Appendix A of the Petition for a Writ of Certiorari. There were no dissenting opinions. The opinion reversed a decision of the United States District Court for the District of Columbia reported at 367 F.Supp. 640. The Court below remanded to the District Court to vacate a preliminary injunction that had been issued by that Court. The Court below found that the District Court lacked subject matter jurisdiction of the controversy.

QUESTIONS PRESENTED

The controversy involves whether the threatened disclosure by the Air Force of technical information of a proprietary character may be enjoined under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, (1970) where the right to disclose is alleged to have arisen under a contract between the Parties and the submitter of the data disputes the existence of that right.

The Court below characterized the issues as sounding solely in the law of contracts related to a unilateral decision of a Contracting Officer as to the application of the Rights in Data Clause of the contract. The Court below concluded that jurisdiction to afford relief as to such disputes arose exclusively under the Tucker Act, 28 U.S.C. § 1491 (1970). The Tucker Act provides that action upon contract matters be com-

menced in the Court of Claims. District Court jurisdiction under the Tucker Act is concurrent with that of the Court of Claims, since the Court of Claims is without the inherent power to grant injunctive relief, the District Court could not do so. The Court, therefore, found that the sole avenue of relief available to the Petitioner was a post-disclosure remedy in monetary damages for breach of contract by action in the Court of Claims under the Tucker Act.

The opinion below forecloses government contractors from an injunctive remedy in such circumstances which would be generally available to them under the common law. Underlying all of the issues, therefore, is the basic question of whether the peculiar immunity of the sovereign is intended to permit it to take actions in the guise of the exercise of a contractual right which, if taken by a private citizen, would be subject to injunctive relief in an appropriate case.

The questions involved include the following:

1. Is the Tucker Act the exclusive source of remedial jurisdiction for the breach by the Government of a contract for which breach monetary damages are not an adequate remedy to preserve the property interest involved?

2. If 1 above is answered in the affirmative, was the Court below correct in characterizing the issues in the controversy at bar as constituting solely a contract dispute?

3. If the question in 2 above is answered in the negative, does jurisdiction to enjoin the threatened disclosure by the Government exist under the Administrative Procedure Act?

THE STATUTES AND CONTRACTUAL PROVISIONS INVOLVED

1. The Act of June 25, 1948, 62 Stat. 940 (The Tucker Act), 28 U.S.C. § 1491 (1970) provides:

> "§ 1491. Claims Against the United States Generally; Actions Involving Tennessee Valley Authority
>
> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort . . . ."

2. The Administrative Procedure Act is set forth in Appendix E to the Petition.

3. The applicable procurement regulations and contractual clauses are set forth in Appendix E to the Petition.

THE INTEREST OF THE NATIONAL SECURITY INDUSTRIAL ASSOCIATION

The decision below threatens the effective nullification of a compromise between the Government and American Industry which was made in the interests of the public. By virtue of that compromise the Government has been able to obtain effective access to the Industry inventory of technological innovation represented by proprietary and trade secret data developed by Industry at the expense of its stockholders. Nullification of that compromise threatens to deprive the public of the innovative genius of our society at a time in the affairs of our nation when we can least afford to be second best in any area of national concern. NSIA was deeply involved in the formulation of that compromise, and therefore, believes it appropriate that it should become involved in the effort to preserve it.

The contract clause in issue is a verbatim implementation in the specific contract of a regulatory plan [1] in the formulation of which NSIA played a material role.[2]

---

[1] Section 7 of the Armed Services Procurement Regulation (ASPR) from whence the contract clause ASPR 7-104.9(a) was taken does not establish procurement policy. Section 7(a) merely collects in one place standard, contract clauses which are to be used when applicable. Policy regulating where such clauses are to be used and their intended function and applicability are contained in other Sections of the ASPR, in the case at bar, in the provisions of Section 9, Part 2 and more specifically ASPR 9-202 and 9-203. Comparison of the contract language prescribed by ASPR 9-203(b) with that contained in the standard, specific contract clause in ASPR 7-104.9(a) reveals that the source of the standard clause is the language prescribed by the regulation.

[2] *See e.g., Hearings Before Subcommittee No. 2 (Proprietary Rights and Data) of the House Select Committee on the Problems of Small Business*, 86th Cong., 2d Sess. (1960), Testimony of G. C. Bannerman, then Director of Procurement Policy, Office of the Assistant Secretary of Defense (Supply and Logistics) at p. 139. Mr. Bannerman stated:

> "Before we issue segments of the 'Armed Service Procurement Regulations' that have a significant impact on industry, and clearly this one did, it is our normal practice to coordinate the work that we have prepared with industry through usually a variety of industry associations. For instance, this policy was co-ordinated through not only the Strategic Industries Association . . . but also the National Security Industrial Association, the automobile manufacturers, the electronics industry, machinery and allied products industry and a number of others.
>
> . . . .
>
> The data section of ASPR was thoroughly coordinated over a period of years before it was issued, and even after it was issued in 1957 we found changes that we thought needed to be made to protect some of the interests that have been discussed in these hearings, and I am sure you know, as we discussed the changes made in 1958, to sharpen this up. We are willing and ready to make additional revisions, but we have not had general criticism of this policy in the intervening year and a half."

That regulatory plan was painstakingly evolved over two decades of Government-Industry dialog. The content of the contract clause is not, therefore, the product of specific negotiations conducted between Petitioner and Respondent with respect to this particular contract. Consequently the issues presented have an origin and impact beyond the parameters of the intention of these particular parties in this particular contract. The issues involve the threatened expropriation by public disclosure of proprietary technical information of Petitioner which was submitted to the Government under restrictions contemplated by the procurement regulations which, if honored, would render such disclosure wrongful. While it is true that upon one level the issues involve a breach of the particular contract, it is also true that they involve a breach of an Industry-Government compromise reflected in regulations governing overall procurement policy in these regards. The issues raise vital aspects of governmental integrity and ability to effectively honor the commitments which it has made to its citizens. Those who deal in the marketplace recognize that good faith and integrity are vital elements in the willingness of others to continue to do business. The issues cannot properly be understood in all of their ramifications apart from the historical background in which they arose.

In essence, the conflict between Industry and Government over the matter of the right to acquire and use privately developed proprietary technical data arose in the context of the pressure of historical events of dramatic impact upon our society. As the conflict of ideologies evolved, it became increasingly apparent that

the need of the Government to procure a broad spectrum of goods and services, particularly in the area of national defense, would become a permanent and ever-increasing part of the American social and economic scene. Congress properly mandated that such procurement be accomplished to the maximum extent possible by the process of advertised bidding. 41 USC § 252(c) (1970); 10 USC § 2304 (1970). In doing so Congress demonstrated its firm belief that the free enterprise system and its essential premise of free and open competition would produce the best products and services at the lowest cost to the taxpayers. In order to comply with this Congressional mandate to employ and expand competitive procurement, it was necessary for the Government to be able to evolve Government specifications and drawings for the products it needed and to disseminate them to as broad a base of qualified bidders as possible. This procedure permitted bidders who had not previously produced the product involved to nonetheless offer to do so based upon the detailed information furnished to them by the Government. The Governmental objective, therefore, was to acquire or develop the detailed technical information it required free of any restrictions upon its use in specifications and drawings which could be publicly issued in connection with advertised procurements. "Competition" for Governmental purposes as purchaser was measured by the number of qualified bidders it could obtain for the manufacture of the goods and performance of the services it required.

"Competition" from the Industry standpoint as sellers necessarily had a different context. For Industry "competition" meant beating competitors in the market

by lawful means. The essence of such lawful means was the skill, ingenuity, and innovativeness of the particular company. If it could build a better product than its competitors at an equal or lower cost, it would necessarily outsell such competitors. To obtain such a position companies were constantly investing the funds of their stockholders in research and development. Since reduction of cost and improvement of existing products were objectives as well as the development of new products, much of the tangible results of that investment were in the nature of unpatentable material. Nonetheless, both the companies and the law, *see e.g., Kewanee Oil Company* v. *Bicron Corporation,* 416 U.S. 470 (1974), recognized the substantial economic value of this body of proprietary assets. "Know-how" in the techniques and processes of manufacture, utilization and processing of raw materials and similar areas, often developed at substantial investment of time and money, frequently was the foundation of the superior competitive position of many companies.

It was inevitable, therefore, that these two opposing views of the essence of "competition" would come into conflict. The Government could not "re-invent the wheel" in order to achieve expanded competitive bidding. Industry refusal to surrender its proprietary know-how in "wheel-making," developed at the expense of its stockholders, was also urged in terms of the premises of fostering "competition." As the Government demand for the acquisition of unlimited rights to all the technical information which it would require to accomplish future advertised procurement increased, the resistance of Industry to furnishing such data with such

unlimited rights similarly increased.[3] In essence, unlimited rights are the equivalent of ownership. Limited rights, in essence, permit Governmental use but not public disclosure and use. It became apparent that a uniform and published procurement policy was required in this vitally important area. The Department of Defense, although starting such efforts in 1955, ultimately issued the first truly definitive such policy regulations in 1958. Those regulations were published as Section IX, Part 2 of the Armed Services Procurement Regulation (ASPR).

Growing Industry dissatisfaction with that regulatory policy erupted in open dissension by 1960. Although the problems were complex, in essence they centered about two primary issues. The first was the complaint that Contracting Officers and other procurement officials were demanding the submission of proprietary data with unlimited rights even in circumstances where the regulations stated that no such demands should be made. The second was the complaint as to the regulatory definition of "proprietary data" which was either not to be demanded or, if required, was to be either purchased at a negotiated price (where needed for future competitive procurement) or furnished under "limited rights" (where needed only to facilitate the operation and maintenance of the pur-

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[3] *See e.g.*, Howland, *Technical Data and Patents Under Government Contracts,* 1963 INSTITUTE ON GOVERNMENT CONTRACTS, SOUTHWESTERN LEGAL FOUNDATION, at 103 (Commerce Clearing House, Inc., Chicago 1964); *see also,* COMPTROLLER GENERAL DECISION, RULES OF LAW ON TECHNICAL DATA, at 1 (Machinery and Allied Products Institute (Library of Congress catalog card number 72-164978) 1971); *Hearings before Subcommittee No. 2 (Proprietary Rights and Data) of the House Select Committee on The Problems of Small Business, supra* note 2.

chased equipment by the Government). *Hearings Before Subcommittee No. 2 (Proprietary Rights and Data) of the House Select Committee on The Problems of Small Business, supra* note 2. The definition of "proprietary data" excluded many concepts, techniques, processes etc. which could be discovered by technical analysis, *i.e.,* "reverse engineering." Industry complained that the issue was not whether a competitor *could* discover the proprietary asset by investment of the same time, ingenuity and money as the originator thereof but whether the competitor had, in fact, done so. Its complaint was that the regulatory definition had the effect of prejudicing the innovative company by transferring its proprietary assets free of charge to competitors while the originator had to either absorb the costs of the development of that asset or include them in its price whereas the competitor had no such costs to recover. These serious complaints were brought to the attention of Congress in March of 1960 in hearings before a special subcommittee of the House Select Committee on the Problems of Small Business. *See Hearings, supra* note 2.

The testimony of Industry and Government witnesses at the hearings, among other things, convinced both parties that the existing regulatory plan required reconsideration. It also introduced into the concepts to be considered that of determining the nature of the rights in technical data to be acquired upon the basis of which party had paid the costs of developing such data rather than whether it was "proprietary" in the terms of a definition as to which no consensus of opinion could be achieved.[4]

[4] The Industry proposal to that effect is set out in the three concluding paragraphs of Appendix 13 to the transcript of the Congressional Hearings, *supra* note 2. The Government recogni-

Subsequent to the hearings Industry and Government entered into a continuing dialog upon the formulation of a new regulatory policy. NSIA, for its part, established a special Task Group to interface with the Department of Defense in the study of the problem. All of the leading associations representing Industry also participated. As a result of Industry-Government meetings during November and December 1960, the Department of Defense issued a new draft of ASPR Section IX, part 2. That draft adopted the concept proposed by Industry that all technical data developed at private expense be furnished with rights which limited its use to specific governmental purposes not including use for reprocurement and which prohibited its general public disclosure.

The problems of product improvement contracts arose. Such contracts would involve government funded research and development as well as the delivery of the improved product. In the course of such contracts it was conceivable, indeed, probable that the contractor would incorporate components or processes in the de-

tion of the possible utility of such an approach is foreshadowed in the following remarks of Mr. Bannerman appearing at p. 134 of the transcript:

> "I would like to say that it may well be that where all we want data for is for maintenance purposes, as distinguished from reprocurement or manufacturing purposes, we may find out that we have got to provide some way of getting that data with the limited right to use it. I am reluctant to do that for a variety of reasons, and one is that this places a limited right in the Government by contract with respect to a lot of data which, for the most part is not proprietary at all and I do not know that the Government ought to restrict itself in that respect.
>
> . . . .
>
> But nevertheless, it is certainly one possibility and one that will be thoroughly considered."

sign and manufacture of the end item which would be based upon proprietary technical data which it had previously developed at its own expense. The Government, having paid for at least some portion of the development cost of the improved product, both desired and was clearly entitled to the information necessary to permit the product to be competitively procured in the future. At the same time, the contractor should not be expected to forego the future exclusive exploitation of its proprietary asset by disclosure thereof to the Government with unlimited rights. The 1960 draft proposed that the only solution to this problem was that the contractor, at its election, either fund the product improvement developmental aspect of the contract at its own expense or sell to the Government its proprietary asset to be incorporated so that the entire data package would be furnished either with only limited or unlimited rights.[5] As will be seen, this "all or none" position was ultimately recognized not to be in the best interest of the Government and was modified. That modification is highly germane to the issues in the controversy at bar.

The 1960 draft did not meet with Industry approval and was withdrawn. The dialog between Industry and Government continued. A special subcommittee of the Defense Industry Advisory Council was established as the vehicle for this continuing dialog. A further draft

[5] Memorandum of the Director of Procurement Policy, Office of the Assistant Secretary of Defense (Supply and Logistics) commenting upon the draft of the proposed new ASPR Section IX, Part 2 attached to the memorandum. The particular comment referred to appears at the top of page 4 of the memorandum which bears the date November 14, 1960.

was issued in May 1963 and also rejected.[6] Finally, in May 1964 the progenitor of the regulatory plan involved here was issued upon an optional trial basis. That plan was adopted as the new ASPR Section IX, Part 2 effective April 1, 1965.[7] The plan, as pertinent here, was that technical data developed at private expense would be generally furnished with limited rights only. That rule was modified in the situation where such data related to components and processes which were incorporated into an end item the overall development of which had been paid by the Government. In that circumstance data which revealed the contractor's proprietary design or know-how could be submitted un-

[6] Howland, *Technical Data and Patents Under Government Contracts*, note 3 *supra* at 123-126. Mr. Howland was the Chairman of NSIA Task Group No. 6 referred to in the text.

[7] *See* Addresses of the Hon. Paul R. Ignatius, then Assistant Secretary of Defense (Installation and Logistics) and the Hon. John M. Malloy, then Deputy Assistant Secretary of Defense (Procurement) before the Joint Department of Defense—NSIA Technical Information Symposium held at Los Angeles, California in July 1965. Pertinent excerpts from those addresses are published in DEFENSE INDUSTRY BULLETIN, August, 1965. In commenting upon the proposal that only limited rights be afforded the Government in technical data developed at the sole expense of the contractor Mr. Malloy stated (BULLETIN at pp. 15-18):

> "I consider that an outstanding contribution to a rational resolution of the rights problem is embodied in the concept that he who has paid the product development cost has the dominant interest in the rights in the technical data pertaining to that product . . . . Simply stated, if the Government pays for the development work, it is entitled to unlimited rights in that which is paid for. On the other hand, if the product is developed at private expense then the Government—with certain exceptions, such as 'form, fit and function' data—must be satisfied with limited rights if it orders technical data pertaining to such privately developed products, unless, of course, it negotiates for and pays for the data separately. This result is fair if it is understood and accepted by the Government."

der limited rights provided that the contractor furnished with unlimited rights, data as to the configuration of the proprietary components, the place and dimensions etc. wherein they fitted into the end item, and the functional and performance requirements the component had to achieve.[8] In that way the Government could still procure the end item competitively by utilization of the data which it owned together with specifying the details as to the proprietary components necessary for the bidders to evolve their own design for such components or purchase them from the development contractor or some other external source. The Government drawings would set forth the form, fit and function details as to such components but not the details of their design or manufacture. They would designate the development contractor's part number but provide that the bidders had the option of providing an "equal," i.e., a part of their own which met the form, fit and functional requirements specified.

This was the compromise of conflicting interests which was mutually evolved between Industry and Government over the years. That it was not entirely satisfactory to either party serves merely to corrobo-

[8] Script of Department of Defense film entitled "Rights in Technical Data", comments of Mr. Paradis, pp. 6-7 explaining these provisions.

> "If ordered, technical data in the following categories shall be obtained with unlimited rights:
>
> . . . .
>
> (b) Technical data necessary to enable manufacture by others of items (and performance of processes) developed under Government contracts in which experimental, developmental or research work was specified as an element of contract performance, except that data pertaining to components developed at private expense incorporated in the developed item is subject to limited rights, if the contractor furnishes with unlimited rights, what we call form, fit and function data."

rate its character as a compromise. It is upon that compromise that the contractual provisions of the instant contract are founded rather than upon a specific bargain fashioned by the individual negotiations and intentions of the parties. That compromise is essential to the recognition, protection and preservation of a socially and economically valuable property interest the nature of which is such that a single disclosure into the mainstream of commerce is tantamount to destruction of the interest itself.

The characterization of such issues as being solely related to a specific dispute under a specific contract, should it thereby bar a remedy adequate to preserve the overall compromise, is an oversimplification of dire consequence.

Because it was instrumental in formulating that compromise and in encouraging industry acceptance of it, NSIA considers that it is both appropriate and morally obligatory upon it to appear herein as *amicus curiae*. Its interest is not properly in the effect of the opinion below upon the individual affairs of Petitioner nor in whether the detriment to Petitioner is real or fanciful, minor or substantial. Its interest in the matter before the Court is in the rule of law pronounced by the Court below and its disastrous effects upon the government contract industry as a whole.

STATEMENT

There is no need for NSIA to burden the Court with a detailed statement of the background of the case since that will be accomplished in the briefs of the parties.

The essential elements of the case can be stated briefly albeit in somewhat oversimplified fashion. The

Petitioner at its own expense had developed proprietary data of a trade secret character related to components developed by it for use in a guidance system. It proposed and ultimately entered into a contract with the Air Force to fabricate a "breadboard" system incorporating its proprietary processes and components; to test the system to demonstrate the improvements brought about by the use of is components, and to submit a Final Report stating the results of the tests. During the course of the contract the Air Force, stating that it required the information in order to properly evaluate the test results, requested Petitioner to furnish operational details with respect to the system being tested. The information requested included details of the mathematical equations and logic diagrams of Petitioner's proprietary components. Petitioner furnished the information in a special report not required by the contract. Petitioner placed a legend upon that report restricting its use and disclosure by the Government to disclosure solely within the Government and solely for purposes of evaluation. The use of such a legend is provided for in applicable procurement regulations, ASPR 9-202-3 which, in turn, are reflected in the provisions of the contract, ASPR 7-104.9(a).

The Air Force did not object to the legend upon the special report. However when that same data was included in the reports required to be submitted under the contract and the Petitioner utilized a similar restrictive legend upon those reports related to the portions thereof disclosing the proprietary data, the Air Force objected. Ultimately the Air Force, without affording the Petitioner the opportunity to test and evaluate the propriety of its support for doing so, determined that the entire contents of the reports, including the proprietary data, were its sole property in which it had unlimited rights of disclosure and use. Public disclosure became imminent through the transmission of the reports to the Defense Documentation Center, a Department of Defense activity which disseminates information and documents to the general public including competing defense contractors.

Petitioner commenced action in the District Court seeking a preliminary and permanent injunction against disclosure of the proprietary data. The Government moved to dismiss the action for lack of jurisdiction. By memorandum opinion dated July 10, 1973 the District Court retained jurisdiction. The Court issued a preliminary injunction. The Government appealed. The Circuit Court reversed and remanded the matter for vacation of the injunction upon the ground that the District Court lacked subject matter jurisdiction.

REASONS FOR GRANTING THE WRIT

The Most Compelling Reasons of Public Policy Suggest That the Court Grant the Writ To Clarify That the Tucker Act and the Administrative Procedure Act Are Not Mutually Exclusive Enactments But Are Sister Statutes Intended To Provide Adequate and Meaningful Relief Against the Sovereign as Appropriate to the Circumstances.

1. The holding below fails to recognize that the limitation upon the power of the Court of Claims to the granting of solely monetary relief does not arise because of limitations upon the waiver of sovereign immunity in that regard but as the result of a limitation upon the powers of that particular court as such.

We are faced with a situation in which a vital element of Governmental procurement policy deeply rooted in the public interest and evolved over two decades of Government dialog with American Industry

is threatened with nullification. That policy reflects a finely tuned balance between the need of the Government to have access to and use of proprietary technical information in the national interest and the fiduciary duty of the managers of industry to preserve proprietary assets developed at the substantial and continuing investment of stockholder funds.[9] A few companies, if faced with the legal proposition that they are powerless to prevent Government disclosure of their proprietary assets will withdraw from the Government market entirely. Many more companies will become increasingly selective with respect to their continued participation therein. That is a shocking but very real possibility.[10] Should it occur, substan-

[9] Due to legal and other restrictions industry statistics upon the level of industry investment in privately financed research and development are not readily available. However, the Comptroller General conducted a survey of the 77 major companies involved in the defense industry alone. During the four-year period between 1968 and 1972, those companies expended two billion six hundred seven million dollars in privately funded research, development and bid and proposal costs. Based upon that study and expanding its scope to all companies involved in all types of activity, it seems fair to estimate that private investment in research and development involves an investment level well in excess of one billion dollars a year. COMPTROLLER GENERAL REPORT No. B-167034, April 16, 1973.

[10] In discussing the probable effect of such a situation the Commission on Government Procurement established by Congress under the Act of November 26, 1969, Pub. L. No. 91-129, 83 Stat. 269 stated:

> "[A]n inadequate system for safeguarding protectable data adversely affects a contractor's willingness to accede to the Government's requirements for data and the willingness of some firms to participate in Government procurement."

4 REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT Pt. I, *Problems In Acquisition and Use of Data* at 129 (1973).

Similar concerns were recognized by both industry and government witnesses in the 1960 Congressional hearings upon the subject.

tial and irreparable detriment to the public interest will be the inevitable result.

The decisions of the Court below present a curious anomaly. That same Court was among the first to recognize the right of the owner of proprietary data submitted to the Government in a non-contractual context to enjoin its disclosure by action under the Administrative Procedure Act.[11] It here holds that the unilateral claim of a Contracting Officer of ownership of such data by virtue of his judicially unreviewed determination of a question of law is sufficient to divest the Petitioner of a preventive remedy to which it

Moreover the testimony at those hearings emphasized the quandary of small, highly specialized businesses the economic survival of which may depend upon doing government business even at the cost of the expropriation of their proprietary assets. Larger companies with stronger commercial positions necessarily have greater freedom of choice and greater opportunity to be more restrictive and selective in their participation in the government market. *See, Hearings Before Subcommittee No. 2 (Proprietary Rights and Data) of the House Select Committee on the Problems of Small Business*, 86th Cong., 2d. Sess. (1960).

[11] In *Sears Roebuck & Co.* v. *General Services Administration*, 384 F.Supp. 996 (D.D.C. 1974) the District Court for the District of Columbia held that jurisdiction of an action by the submitter of proprietary data to enjoin its public disclosure by the Government existed under the Administrative Procedure Act. Partial summary judgment was granted to the Government. The plaintiff appealed and, in connection with that appeal, sought and obtained a stay of disclosure pending appeal. Subsequently the Court below vacated the stay previously granted by it in an opinion published at 509 F.2d 527 (D.C. Cir. 1974). It is significant that the Court below stressed the careful evaluation which it had made of the case and of the decision of the District Court which it characterized as "an extremely careful and thorough opinion." 509 F.2d at 528. One must conclude, therefore, that the Court below agreed with the District Court as to the bases of its jurisdiction in the matter.

would be entitled except for its egregious error in entering into a contract with the Government. Thus the Court below has relegated the vital aspect of adequate remedy, not to the existence or non-existence of the conflicting rights claimed, but rather to the uninstructive fact of whether or not the parties entered into a contract. In doing so it restores to the law of Government contracts a new form of the "tyrannical" power of Contracting Officers over a contractor's business which Congress saw fit to denounce, H.R. REP. No. 1380, 83d Cong., 2d Sess. (1954), and eliminate by enactment of the Wunderlich Act, 41 U.S.C. §§ 321-22 (1970).

Assuming *pro arguendo* that the decision of the Contracting Officer involves solely a determination of contractual rights which, if mistaken, constitutes merely a breach of contract, the question remains whether monetary damages are the Congressionally mandated exclusive remedy against the Sovereign for such breach.

The Court below has so held by implication. Examination of the bases of that holding, however, reveals some degree of doubt as to its accuracy. Nowhere in the express provisions of the Tucker Act is such a Congressional pronouncement found. That statute is addressed solely to "claims against the United States." It does not identify the claims intended as those seeking only monetary relief. Moreover it includes claims founded upon "any regulations of an executive department". 28 U.S.C. § 1491 (1970). Logically one might conclude that such claims are also under the exclusive jurisdictional umbrella of the Tucker Act yet the Court below has entertained an injunctive action under the Administrative Procedure Act with

respect to a claim of breach of such a regulation. *Scanwell Laboratories, Inc.* v. *Shaffer,* 424 F.2d 859 (D.C. Cir. 1970). What the Tucker Act does do, however, is to designate the Court of Claims as the forum in which action upon such claims shall be brought. As a matter of the historical origins of the Court of Claims, *see Glidden Co.* v. *Zdanok,* 370 U.S. 530, 552-558 (1962), rather than of express Congressional limitation upon the waiver of sovereign immunity, the Court of Claims lacks the inherent power to grant equitable relief. It might be argued that, in selecting such a forum for contract claims, Congress thereby by implication limited such waiver to actions for monetary damages. But why would Congress withhold injunctive relief in such matters when it is clearly recognized that in other respects, including the award of contracts, *Scanwell Laboratories, Inc.* v. *Shaffer,* 424 F.2d 859 (D.C. Cir. 1970), the Sovereign should be subject to injunctive remedy? Why should unilateral agency action in matters of contract have been considered by Congress any more sacrosanct than unilateral agency action in other respects subject to the injunctive remedies of the Administrative Procedure Act? It is respectfully submitted that Congress did not so intend.

Certainly it cannot be said that Congress contemplated that vital Government procurement activity could be disrupted upon a regular basis by a plethora of injunctions issued with respect to the decisions of its Contracting Officers. That conclusion of the Court below is eminently sound. The question, however, is the nature of the statutory device which Congress employed to prevent such a situation. The Court below held that such device lay in the case by case content

to be judicially given to the provision of the Administrative Procedure Act making it applicable to "agency action", 5 U.S.C. § 702 (1970). It would seem, however, that all Congress intended by that provision was to prevent the unauthorized and undirected conduct of a lower level government employee from being construed as the action of his agency. In that context it is indisputable that, in matters of contract, the Contracting Officer is not only an authorized person but the only person authorized to act for the agency. It is a strained interpretation of that provision and one fraught with potential ambiguity to stress the particular nature of the action in question as determinative of that particular statutory criterion.

It is respectfully submitted that the control device intended by Congress lies instead in the provision of the Administrative Procedure Act making it inapplicable where an "other adequate remedy in a court" exists. 5 U.S.C. § 704 (1970). The vast majority of contract disputes necessarily would involve matters for which damages in the Court of Claims under the Tucker Act would be a demonstrably adequate remedy. Moreover the granting or withholding of injunctive relief is addressed to the discretion of the Court. A demonstrated matter of paramount national interest and urgency would be a proper basis for the exercise of discretion to deny injunctive relief even where monetary damages would not generally be as adequate relief as an injunction. Contractors, faced with the substantial legal obstacles to the obtaining of injunctive relief, would not likely be encouraged to seek it when relief by way of monetary damages is both reasonably adequate and more easily available. It is proper to conclude that Congress intended that citi-

zens be afforded meaningful redress against the sovereign upon its contracts. Such redress includes injunctive relief where such is the only adequate and meaningful relief in the circumstances.[12]

If it be granted that the decision of a Contracting Officer constitutes "agency action," the issue becomes whether the remedy under the Tucker Act, necessarily to be sought in the Court of Claims, and for that reason alone limited to monetary damages, is adequate in the case of a disclosure of proprietary data. Consideration of the distinction between patents and proprietary data serves to demonstrate that such a remedy is wholly inadequate to preserve the property interest in such data.

The essence of patents is public disclosure. The property right in patents cannot be established without such disclosure. The essence of proprietary data is non-disclosure. The nature of the legal wrong in patents is infringing use. Such use damages the value of the patent but does not impair the basic property interest in it. The nature of the legal wrong in proprietary data is disclosure. Such disclosure as a practical matter, not only damages the value of the data but, far more importantly, is tantamount to destruction of the property interest in it. Once disclosure into the mainstream of commerce has occurred, the owner of proprie-

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[12] The progenitor of the present Tucker Act (24 Stat. 505 (1887)) provided that the Court of Claims has jurisdiction over all claims upon which " 'the party would be entitled to redress against the United States either in a court of law, *equity*, or admiralty if the United States were suable . . . .' " (emphasis added). *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 556 (1962). Congress in the Administrative Procedure Act made the sovereign suable for injunctive relief in a court of equity.

tary data more often than not finds himself unable to establish that he was the unique prior owner. Even if he surmounts that obstacle he may not be able to establish the precise nature and degree of the damages he suffered by the wrongful deprivation of such ownership. Necessarily, since much of proprietary data, while innovative, is within the state of the prior art or otherwise unqualified for patent protection, the owner cannot be permitted to claim exclusive ownership against the world simply because he establishes in one action that the initial public disclosure of his data was wrongful. To do so would be to judicially create a patent which would not be obtainable under the statutes. The practical result is that disclosure, whether voluntary or wrongful, effectively destroys the property interest since it is no longer capable of continuing exclusive exploitation.

It is readily apparent that a remedy which does not even arise until after disclosure has, in fact, occurred is wholly inadequate to protect the property interest in proprietary data. In a case in which there is a dispute over the ownership of property which, if disclosed, will be destroyed, it seems appropriate that the Courts be able to temporarily preserve that property by injunction pending judicial determination of the conflicting claims of ownership in it. If, as is not the case here, substantial and urgent national interests would be frustrated even by such temporary restraint, then it is appropriate that the Court not grant such restraint and leave the purported owner to a remedy in damages however inadequate it may be. If, on the other hand, the claim of ownership of the party seeking to disclose is determined to be unfounded, then the status quo has been preserved and the vitality and value of

the property interest has been kept intact. Such a proper resolution is available in the common law. *See e.g., Kewanee Oil Co.* v. *Bicron Corp.,* 416 U.S. 470 (1974).

Such a resolution is available against the Sovereign where the data in question was not submitted in a contractual context. *Sears, Roebuck & Co.* v. *General Services Administration,* 384 F.Supp. 996 (D.D.C. 1974).

There is no basis in law or equity why such resolution should not be available against the Sovereign simply because it claims ownership by virtue of conveyance under a contract where the complaining party disputes that such conveyance occurred. The Court should grant the writ to clarify that property interests of the type involved here can be preserved pending resolution of conflicting claims of ownership notwithstanding the context in which such claims of ownership arise.

2. Conflicting claims of ownership based upon Procurement Regulations deeply rooted in the public interest should be addressed under the Administrative Procedure Act notwithstanding that they are presented in the context of a specific contract.

As relevant here, the only contract language specifically negotiated between the parties is that contained in the Statement of Work. The Statement of Work, as relevant here, provides that the data to be delivered under the contract shall "define . . . the functions and operations of the major units of the system. . . . " Such language does not identify any specific data or any specific unit or component. In essence, it is nothing

more than a repetition of the language of the standard contract clause ASPR 7-104.9, ASPR 9-203(b):

> "3(b)(1) The Government shall have unlimited rights in:
>
> . . . .
>
> (iv) technical data pertaining to end-items, components or processes which was prepared for the purpose of identifying sources, size, configuration, mating and attachment characteristics, functional characteristics and performance requirements ('form, fit and function' data, *e.g.*, specification control drawings, catalog sheets, envelope drawings, etc.)."

The regulation governing *policy* in the use and application of this clause (ASPR 9-202.2(c)) provides in part:

> "(. . . *Neither the foregoing statement of data rights policy, nor its implementing paragraph (b)(1) and(2) of the Basic Data Clause in 9-203(b), establishes data requirements for a particular contract. . . . Contract clauses and the schedule establish the form and type of data to be furnished; the categories into which such delivered data fall, [and] determine the rights to be obtained by the government to use or publish such data).*" (Emphasis in the original).

Subparagraph (d) then proceeds to establish the procedure by which the parties will mutually negotiate, identify and categorize the data. Under that procedure the parties mutually identify the data to be furnished and list it specifically in the contract schedule. The parties then agree, as to each item of data identified, whether it is to be in the category of unlimited rights data (which would include form, fit and function data

mutually agreed to be such) or in the category of limited rights data.

There were no mutual negotiations by which the data in question here was either specifically agreed to be furnished or by which it was agreed that it constituted form, fit and function data. The Petitioner negated any implied agreement upon its part to that effect by submitting that data in a special report marked with a limited rights legend. If, indeed, the Air Force believed such data to be both required by the contract and data which was recognized to be unlimited rights, form, fit and function data, one would expect that it would have objected to its submission *at any time under any circumstances* under a limited rights legend. It did not do so. It was only when Petitioner made the logical but, in hindsight, serious error of also including such data in the report required by the Contract Statement of Work that the Air Force objected to the limited rights legend with respect to it. Thus, from the outset, the Air Force conduct was contradictory. Such circumstances constitute a tacit acknowledgement that its assertion of such ownership might be in violation of the procurement regulation requiring it to specifically mutually identify with the Petitioner precisely what data was required by the contract and precisely what rights the Government would be entitled to in the use and disclosure of that data. The inconsistency of the Air Force conduct demonstrates that its belated claim of ownership was founded entirely upon the provisions of ASPR 7-104.9, ASPR 9-203(b) reciting the standard language related to form, fit and function data. As noted, the regulations specifically provided that no claim of right in specific contract data may be properly premised upon the mere provisions of the Basic Data Clause itself. Such rights

must be specifically acquired in specific data by mutual agreement under the specific contract.

Such requirements are integral and vital parts of the regulatory plan evolved by Industry and Government to protect the proper and legitimate interests of each in technical data often, as here, involving proprietary matter of a trade secret character. Each of these requirements represents a procedure mutually intended to remove the acquisition of rights in such data from the purely unilateral decision of either of the parties. They establish ground rules whereby the government can obtain the data it needs and upon which the contractor can rely that he cannot be forced to furnish such data unless he agrees to do so either under circumstances of restricted use and disclosure or compensation for conveyance of such data satisfactory to him. None of these regulatory requirements were fulfilled here. Consequently the unilateral decision of the Contracting Officer to disclose the data in question constituted a threatened breach of procurement regulations. Framing such action in the context of a determination of the applicability of a contract clause is clearly erroneous where the regulations prohibit any such right from arising purely under such standard clause. Moreover it elevates form over substance with impermissibly detrimental impact upon the public interest.

Had the Court below properly recognized the issues as involving primarily a threatened violation of procurement regulations deeply rooted in the public interest, its own prior decisions would have compelled it to reach an opposite conclusion. *See e.g., Scanwell Laboratories, Inc.* v. *Shaffer,* 424 F.2d 859 (D.C. Cir. 1970).

This Court should grant the Writ to prevent the nullification of the compromise of Industry and Government

made in the best interests of the public and reflected in the regulations which the Government proposes to violate. Necessarily such conduct constitutes agency action of the most significant impact. Post-disclosure damages are wholly inadequate to prevent the destruction, not only of Petitioner's particular property interest, but of the carefully modulated compromise of private and public rights whereby the Government has been able to have access to the ingenuity and know-how of Industry.

CONCLUSION

If the rule of law pronounced by the Court below must stand, industry must necessarily reassess the already substantially greater risks to business privacy involved in doing business with the Government. As a result, highly innovative firms with substantial commercial business may determine to become more selective in the Government's market. Ironically a conflict which was fostered by Government desire to increase the number of competitors in that market may very well produce a diametrically opposite result. Not only does a decreased number of competitors augur substantial increase in the cost of Government acquisition of the goods and services it requires, but the Government will be deprived of the benefits of the innovative technological advances made and to be made by the companies selectively retrenching from broad involvement in the Government market.

If Congress has not waived the immunity of the Sovereign to injunctive remedy in contract matters where appropriate, and if the controversy at bar is properly a contract matter, then redress must be sought in Congress rather than in the Courts. But where Congress has already provided adequate redress in

existing statutes it is the duty of the judiciary to properly apply such statutes to afford such redress. NSIA believes that the case at bar falls into the latter category and, therefore, urges the Court to grant the Writ to clarify the proper forum in which future redress must be sought; for adequate redress must be had in the interests of Industry, the Government and the Public.

For all of the foregoing reasons, the writ should be granted.

Respectfully submitted,

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